2020

A Public Health Law Path for Second Amendment Jurisprudence

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The two landmark gun rights cases, District of Columbia v. Heller *and* McDonald v. City of Chicago, *came down in 2008 and 2010, respectively. In the decade that has followed, two things have become abundantly clear. First, these cases provide little clarity about the nature and scope of Second Amendment rights, resulting in chaos and circuit splits in the lower courts. Second, growing empirical evidence has revealed that, in the background of the debate on individual constitutional rights, a serious gun violence epidemic is intensifying around the country. In one corner, gun rights advocates worry that increased firearm regulation will relegate the Second Amendment to a "second-class" right. In the other, gun control advocates are desperate for a solution to address this growing public health crisis. The role of history in addressing a modern problem intensifies the tension. But historically grounded solutions to this contemporary challenge exist in public health law. However, public health law precedent remains perplexingly unexplored by the courts. This Article considers a public health approach to prevention in the context of public health law jurisprudence and Second Amendment rights. It does so by making use of a well-established framework that allows courts to engage in a balanced analysis that accounts for the state's interest in protecting public health and safety while still guarding individual rights. This novel approach bridges the gap between the empirical public health data and constitutional theory, offering clarity for the uncertainty currently plaguing academics, policymakers, and courts.*

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INTRODUCTION

When Tammy and Kevin Jones wanted to open their new business venture in the Loudon County area of Northern Virginia, they were held up by a frequent foe to entrepreneurial aspirations: bureaucratic red tape.[1] The Jones's dream to open Bullets & Beans, a hybrid destination where someone could purchase their firearms and a latte, was bogged down by government regulations, but, perhaps, not in the way one might expect.[2] The Jones's were able to get their state and federal permits to begin selling firearms almost immediately. However, they had to create alternative plans for the portion of the shop meant to sell coffee until the town council went through the necessary regulatory hurdles.[3] Selling coffee, it seemed, required more government oversight than selling guns.

In Alexandria, Virginia, not far from where the Jones's opened their store, a man walked onto a baseball field where politicians were practicing for the annual congressional baseball game. Witnesses stated that he asked whether it was the Democrats or Republicans practicing and opened fire shortly after receiving confirmation they were Republicans.[4] The gunman wounded five people before being shot by police and becoming the lone fatality.[5]

Given the ease of firearm sales and purchases in Virginia, one might have expected the shooting of members of Congress to lead to a call for gun control regulations at least as strict as those required for the sale of coffee.[6] And while some did plea for gun control, for many others, the shooting prompted calls to "repeal laws that keep good guys from carrying guns."[7]

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1. Jessica Sidman, *This Couple Is Having an Easier Time Selling Guns Than Coffee*, WASHINGTONIAN (Sept. 28, 2016), https://www.wasingtonian.com/2016/09/28/couple-easier-time-selling-guns-coffee/.

2. *Id.*

3. *Id.* The necessary changes included approving the building be rezoned for food and drinks, providing a special-use permit to allow a restaurant next to residential property, and giving an exception to regulatory requirements that the coffee shop have parking. *Id.* In the meantime, the portion of the shop meant to sell coffee was outfitted with beanbags and video game consoles for children to use. *Id.*

4. John Woodrow Cox et al., *"He's Got a Gun!" At a Congressional Baseball Practice, a Burst of Gunfire and a Lawmaker Down*, WASH. POST (June 14, 2017), https://www.washingtonpost.com/local/it-was-bedlam-at-a-congressional-baseball-practice-a-burst-of-gunfire-and-a-lawmaker-wounded/2017/06/14/85bf50ac-5106-11e7-91eb-9611861a988f_story.html.

5. *Id.*

6. The focus on Virginia is due to the close proximity in location and time of these two events that many might connect to suggest a call for stricter gun laws would be rational. It is not to suggest Virginia has the weakest gun laws. In fact, in, 2020, they were rated by the Giffords Law Center as twenty-sixth out of the fifty states in strongest gun laws, though this still equates to a "D" grade on the site. Annual Gun Law Scorecard, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://lawcenter.giffords.org/scorecard/#VA (last visited Apr. 15, 2020).

7. Nicole Gaudiano, *Congressional Baseball Shooting Inspires Bill to Weaken D.C. Gun Rules*, USA TODAY (June 16, 2017, 4:30 PM), https://www.usatoday.com/story/news/politics/2017/06/16/congressional-baseball-shooting-inspires-massie-bill-weaken-dc-gun-rules/102926468/. Supporters believed this change "would allow the most law-abiding among us to defend themselves." Jonathan Martin, *Their Own Targeted, Republicans Want Looser Gun Laws, Not Stricter Ones*, N.Y. TIMES (June 14, 2017), https://www.nytimes.com/2017/06/14/us/politics/targeted-republicans-gun-laws-alexandria-virginia-baseball-shooting.html. In *Wrenn v. District of Columbia*, the D.C. Circuit ultimately struck down the strict limitations the District had in place for those who sought a concealed carry permit. 864 F.3d 650, 668 (D.C. Cir. 2017). The

This scenario has played out repeatedly over the years. A gun violence tragedy renews public interest in gun regulations, which are then inevitably met with counterarguments about constitutional rights and the defense of self and others. The debate about stricter gun control versus the "good guy with a gun" solution, however, obscures a shared underlying concern: gun violence is a serious problem. This is hardly a shocking revelation given the steady tide of high-profile gun violence that has swept the nation: Virginia Beach, Virginia Tech, Newtown, Orlando, Charleston, Las Vegas, San Bernardino, Sutherland Springs, Stoneman Douglas High School, and two August 2019 mass shootings that occurred within twenty-four hours in El Paso, Texas and Dayton, Ohio. In fact, according to the Gun Violence Archive, 2425 mass shootings occurred between December 2012, the date of the massacre at Sandy Hook Elementary, and February 28, 2020.[8]

Though mass shootings garner much of the media and public attention, they hardly capture the full scope of the harm caused by gun violence.[9] Mass shootings accounted for 437 deaths and 1803 injuries in 2017,[10] but that represents only about one percent of the firearm deaths for that year.[11] In 2017, nearly 40,000 people died due to firearms,[12] with almost 140,000 individuals sustaining nonfatal firearm injuries.[13] Firearm deaths have now reached their highest point since the Centers for Disease Control and Prevention (CDC) began tracking them fifty years ago.[14] This problem is both large and pervasive.

Research now suggests that gun violence will touch nearly every American. The likelihood of knowing a gun violence victim within any social

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result was hundreds of requests for concealed carry permits, mostly from individuals who do not live within the District. Ann E. Marimow, *Hundreds Apply to Carry Loaded, Concealed Handguns in D.C. Most Don't Live There*, WASH. POST (Jan. 26, 2018, 8:11 AM), https://www.washingtonpost.com/local/public-safety/hundreds-apply-to-carry-loaded-concealed-handguns-in-dc-most-dont-live-there/2018/01/18/566236c2-f0ab-11e7-b3bf-ab90a706e175_story.html.

8. German Lopez & Kavya Sukumar, *After Sandy Hook, We Said Never Again*, VOX, https://www.vox.com/a/mass-shootings-america-sandy-hook-gun-violence (last updated Apr 14, 2020, 3:30 AM) (reporting information based on a regularly updated database run by Vox in connection with the Gun Violence Archive). There is no consensus definition of what qualifies as a mass shooting, but the Gun Violence Archive defines mass shootings as at least four fatal or nonfatal injuries (excluding the shooter) at the same general time and location. *General Methodology*, GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/methodology (last visited Apr. 15, 2020).

9. Sharon LaFraniere et al., *A Drumbeat of Multiple Shootings, but America Isn't Listening*, N.Y. TIMES (May 22, 2016), https://www.nytimes.com/2016/05/23/us/americas-overlooked-gun-violence.html.

10. Lopez & Sukumar, *supra* note 8.

11. *WISQARS: Explore Fatal Injury Data Visualization Tool*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://wisqars-viz.cdc.gov:8006/non-fatal/home (select "2017" for the "From" and "To" fields, then click "Explore Data Button").

12. *2017, United States Firearm Deaths and Rates per 100,000*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://webappa.cdc.gov/sasweb/ncipc/nfirates.html (last visited Apr. 15, 2020).

13. *Facts and Figures*, U.C. DAVIS HEALTH, https://health.ucdavis.edu/what-you-can-do/facts.html (last visited Apr. 15, 2020).

14. *See* Sarah Mervosh, *Nearly 40,000 People Died From Guns in U.S. Last Year, Highest in 50 Years*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/gun-deaths.html.

network is approximately 99.85%, regardless of race, ethnicity, or social class.[15] The percentage only drops to 84.3% when analysis is limited to fatal shootings.[16] Gun violence is no longer something that happens to *others*. As a result, people across the political spectrum increasingly recognize gun violence as a collective harm that impacts all people, and one that must be addressed.

There is no clear bipartisan solution to gun violence. Unfortunately, the two primary Second Amendment Supreme Court cases, *District of Columbia v. Heller* and *McDonald v. City of Chicago*,[17] provide little clarity in what options are available. Lower courts and scholars alike have searched for answers to the inevitable questions that followed after the proclamation of an individual, fundamental right to keep and bear arms. Some have scoured *Heller* and *McDonald* to find answers to questions outside of the specific holdings of each case. Others have turned to history and more well-established areas of jurisprudence, particularly First Amendment speech doctrine.[18] These attempts at answers have proven inadequate.

Public health law principles, which are well-established but unexplored by Second Amendment scholarship and judicial inquiry, offer key guidance. A public health law lens encourages stakeholders to systematically evaluate the nature of the epidemic in considering population-based measures to address it. A public health law framework identifies whether there is a threat to public health and safety amenable to government action, whether that action has a reasonable chance to mitigate the threat, and if there is an appropriate balance between the burdens on individual rights and benefits to the public.

This Article offers that these tools can provide needed clarity to courts facing a continuous influx of challenges to regulations implicating Second Amendment rights. Second Amendment scholarship and judicial inquiry have focused primarily on individual rights, seeking to define the scope of Second

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15. Bindu Kalesan et al., *Gun Violence in Americans' Social Network During their Lifetime*, 93 PREVENTIVE MED. 53, 55 tbl.1 (2016).

16. *Id.*

17. 554 U.S. 570 (2008); 561 U.S. 742 (2010).

18. *See, e.g.*, Josh Blackmun, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479 (2014); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009); Joseph Blocher, *Second Things First: What Free Speech Can and Can't Say About Guns*, 91 TEX. L. REV. 37 (2012); Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295 (2016); David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (2014); Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012); Darrell A.H. Miller, *Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian*, 91 TEX. L. REV. 137 (2012); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Jordan E. Pratt, *Uncommon Firearms as Obscenity*, 81 TENN. L. REV. 633 (2014); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443 (2009); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009).

Amendment protections. But public health law properly places the state's interest in protecting public health and safety into the equation.

Despite Justice Clarence Thomas's contention that limiting an individual's Second Amendment right renders it a "second-class right,"[19] a proper examination of public health law cases proves this is simply inaccurate. Courts have consistently upheld government authority to infringe on reproductive rights, privacy, religious rights, bodily integrity, autonomy, and even speech rights in the name of public health and safety, without rendering any of these "second-class." And yet, this precedent is rarely discussed in any detailed analysis of the Second Amendment.

This Article proceeds in four parts. Part I examines the foundational cases establishing an individual right to keep and bear arms and exposes how the lower courts have struggled to find the limits to a fundamental right to firearms. Part II introduces the public health lens and public health law framework as a means of exploring the state's interest in protecting the health and safety of its people. In doing so, this Part shows that the police power can—and should—limit constitutionally protected rights in certain circumstances. Part III discusses gun violence as a public health problem, exploring more broadly the harmful impact of firearms. By taking a more nuanced view of the gun violence epidemic, this section contextualizes the preceding discussion of individual rights and the state's interest in protecting public health and safety. Finally, Part IV identifies how public health law addresses the uncertainty present in the nascent Second Amendment doctrine. In doing so, this Article concludes that public health law provides crucial tools for examining the state's interest in reducing preventable risk and has important implications for the unanswered questions of the Second Amendment. By recognizing this fact, this Article provides a path for protecting Second Amendment rights, while finding effective solutions for the gun violence epidemic.

I. THE RIGHT TO KEEP AND BEAR ARMS

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[20]

Rather than focus on the militia clause, this Article accepts the majority opinion in *District of Columbia v. Heller* as establishing an individual right to keep and bear arms.[21] Instead, this Article seeks to move the conversation forward by determining what may pass constitutional muster when infringing upon this individual right. Despite the inclusion of the phrase "shall not be infringed," Second Amendment rights, like all other rights, are not absolute.[22]

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19. Silvester v. Becerra, 843 F.3d 816 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 945, 952 (Thomas, J., dissenting).

20. U.S. CONST. amend. II.

21. 554 U.S. at 632.

22. *Id.* at 626.

Therefore, it is critical to examine what the Court says and, perhaps more importantly, does not say in cementing this individual right to firearms.

Any Second Amendment discussion requires an examination of the *Heller* decision, as well as *McDonald v. City of Chicago*, which incorporate the individual right against the states.[23] But inspection of lower courts' interpretation of these cases is vital as well. These lower court opinions illustrate the gaps left by these decisions, as well as the resulting and ongoing challenges both for jurists and policymakers. The inconsistent Second Amendment doctrine that followed exposes the struggle to understand and apply *Heller*. Divergent conclusions have come from disagreements about how to interpret *Heller*, the role of history, the scope of the Amendment, and the relevant standard of judicial review. Put simply, Second Amendment doctrine is a case study in judicial uncertainty.

A. ESTABLISHMENT OF AN INDIVIDUAL RIGHT

Prior to *Heller*, it was unclear what the Second Amendment guaranteed and to whom. The strongest debates loomed around the language and structure of the amendment. Many argued that *United States v. Miller*, in which the Supreme Court upheld a conviction for the transportation of a sawed-off shotgun across state lines, settled that there was no individual right.[24] But "*Heller* breathed new life into the Second Amendment," which some believed had received a "back-of-the-hand treatment" in *Miller*.[25]

The Supreme Court revisited the Second Amendment when Dick Heller challenged the District of Columbia's strict gun regulations. The District generally prohibited the possession of handguns and required residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock.[26] The plaintiff focused on the District regulating the use of a handgun in the home, providing the Court an opportunity to interpret the amendment as providing an individual right on narrow grounds.[27]

Justice Scalia's majority opinion in *Heller* is a historical and textual analysis in the originalist tradition, beginning with a discussion of the meaning of the Second Amendment. The majority bases the necessity of this historical analysis on the principle that the Founders wrote the Constitution with words and phrases intended to be interpreted using their "normal and ordinary" meaning.[28] As a result, the majority found that the amendment codifies a "'right of the people,'" which "unambiguously" refers to an individual right attributable

23. 561 U.S. 742, 791 (2010).

24. United States v. Miller, 307 U.S. 174, 178, 183 (1939).

25. Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171, 171 (2008).

26. *Heller*, 554 U.S. at 574–75.

27. Epstein, *supra* note 25, at 171 (stating that the Court was able to hold an individual right existed without having to determine the full scope of the right or address issues of incorporation).

28. *Heller*, 554 U.S. at 576.

to all members of the political community.[29] This declaration of an individual right was the critical holding of *Heller*, settling the most contentious debate around the relevance of the militia clause.

But other aspects of the holding were less clear, leaving ambiguities in the scope of the Amendment's protections. The Court stated that to "keep Arms" meant to "have weapons," and the weapons were not limited to those "specifically designed for military use."[30] The "bear" portion of the Amendment referred to carrying these weapons, but more specifically to carrying them specifically for purposes of confrontation. This interpretation of "bear" confirmed that the fundamental right underpinning the Amendment is a "right to enable individuals to defend themselves."[31] The Court found their holding consistent with *Miller*, clarifying that Second Amendment protections exclude "those weapons not typically possessed by law-abiding citizens for lawful purposes."[32] In other words, the protections do not extend to "dangerous and unusual weapons."[33]

While the majority identified the core value of the Amendment as the right of self-defense, they did not definitively state whether this meant the right existed anywhere confrontation could arise. Instead, the Court focused on the D.C. regulation limiting the operability of guns in the home. They were able to strike down the regulations because the home is "where the need for defense of self, family, and property is most acute."[34] According to the majority, "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the

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29. *Id.* at 579–80 (quoting U.S. CONST. amend. II). "The phrase 'security of a free state' meant 'security of a free polity,' not security of each of the several States." *Id.* at 597.

30. *Id.* at 581–82.

31. *Id.* at 594. In fact, the majority agreed with Justice Ginsburg's dissent in a previous case that to keep and bear arms refers to being "armed and ready for offensive or defensive action in a case of conflict with another person" *Id.* at 584 (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998) (internal quotation marks omitted) (Ginsburg, J., dissenting)). In the majority's view, if the Second Amendment right to bear arms does not entail a right to self-defense specifically, "the guaranty would have hardly been worth the paper it consumed." *Id.* at 609 (quoting JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 117–118 (1849) (internal quotation marks omitted)). The majority found confirmation of their historical interpretation of the Second Amendment's language and structure in "analogous arms-bearing rights in state constitutions." *Id.* at 600. The Court found that the most likely reading of the state constitutional rights to bear arms secured an individual right for defensive purposes. *Id.* at 602. Moreover, the majority cites several state courts that interpreted their constitutional rights, and often the Second Amendment as well, to confer a right to citizens to carry arms in defense of their property and person. *Id.* at 611–13. Yet, the majority opinion does not discuss that courts interpreting these individual rights through their state constitutions used a highly deferential reasonableness standard. *See generally* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

32. *Heller*, 554 U.S. at 625. The majority specifically rejected Justice Stevens's position that *Miller* found protection under the amendment only for individuals keeping and bearing arms for military purposes. *Id.* at 621–22. The Court instead declared in *Heller* that the *Miller* opinion "declined to decide the nature of the Second Amendment right." *Id.* at 622.

33. *Id.* at 627 (quoting 4 BLACKSTONE 148–49 (1769)).

34. *Id.* at 628.

nation to "keep" and use for protection of one's home and family,' would fail constitutional muster."[35]

In his dissent, Justice Breyer questioned the ease with which the majority declared the regulations unconstitutional. Breyer left the battle over the historical record to Justices Scalia and Stevens.[36] Importantly, however, he believed that recognizing the Second Amendment protects an individual right is "the *beginning*, rather than the *end*, of any constitutional inquiry."[37] The question is not whether a regulation infringes on Second Amendment rights, but instead, whether it does so to an unconstitutional degree.[38]

As Breyer rightfully points out, the government infringes on rights regularly in furtherance of government interests. Here, Breyer contends that the District's regulation "represents a permissible legislative response to a serious, indeed life-threatening problem."[39] In doing so, he acknowledges the state's interest in regulating firearms and the need to balance those interests against the burden on the constitutional right.[40] Even the majority concedes that "[l]ike most rights, the right secured by the Second Amendment is not unlimited."[41] Yet, only Breyer engages in this type of inquiry.[42]

Instead of looking into the District's interests, the *Heller* majority simply struck down the laws as overly restrictive. To demonstrate the right is not limitless, the majority identified, without legal analysis or citation, certain circumstances in which regulations are presumptively lawful. Among those deemed reasonable are restrictions involving who can carry a weapon, such as the "longstanding prohibitions on the possession of firearms by felons and the mentally ill."[43] Other permissible regulations may include where firearms are permitted, as in "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[44] Finally, the majority defines as

35. *Id.* at 628–29 (footnote omitted) (citation omitted) (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).

36. *Id.* at 681 (Breyer, J., dissenting) ("The majority's conclusion is wrong for two independent reasons. The first reason is that set forth by Justice Stevens—namely, that the Second Amendment protects militia-related, not self-defense-related, interests."). "Thus I here assume that one objective . . . of those who wrote the Second Amendment was to help assure citizens that they would have arms available for purposes of self-defense." *Id.* at 682 (Breyer, J., dissenting).

37. *Id.* at 687.

38. *See id.* at 681 (Breyer, J., dissenting) ("[T]he majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in Second Amendment terms.").

39. *Id.* at 681–82 (Breyer, J., dissenting).

40. *Id.* at 689, 693.

41. *Id.* at 626.

42. *See id.* at 689 (Breyer, J., dissenting) ("[W]ith the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.").

43. *Id.* at 626.

44. *Id.*

presumptively lawful those "laws imposing conditions and qualifications on the commercial sale of arms."[45]

McDonald, the follow-up case to *Heller*, added little clarity to the extent of Second Amendment protections. *McDonald* focused on the question of incorporation, and again historical examination took center stage to determine whether the right is "fundamental to *our* scheme of ordered liberty and system of justice."[46] To answer this question, the Court relied on the same historical record utilized in the *Heller* majority. Perhaps unsurprisingly, they concluded that the right to bear arms is "deeply rooted in this Nation's history and tradition"[47] and "among those fundamental rights necessary to our system of ordered liberty."[48]

The holding provided little guidance for future courts. Indeed, *McDonald* reemphasized that even incorporation of the right to bear arms against the states "does not imperil every law regulating firearms."[49] The *McDonald* Court affirmed that the "longstanding regulatory measures" mentioned in *Heller* indicate that the "right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose.'"[50] Thus, the Court assured "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment."[51]

Heller and *McDonald* answer some Second Amendment questions. The cases establish a fundamental individual right to keep and bear arms grounded in the preexisting right of self-defense, independent of whether one serves in a militia. Both also clearly state that the right is not unlimited, finding specific longstanding prohibitions presumptively lawful. Finally, the Second Amendment does not extend to dangerous and unusual weapons. These three findings were sufficient to determine the fate of the regulations in question in *Heller* and *McDonald*. However, the challenges that followed raised many questions for which these determinations proved insufficient to answer.

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45. *Id.* at 626–27. The majority notes that these examples are not exhaustive and that they were not seeking to discuss the entirety of the Second Amendment's scope. *Id.* at 626.

46. McDonald v. City of Chicago, 561 U.S. 742, 764 (2010) (internal quotation marks omitted). The City of Chicago attempted to distinguish the Second Amendment from other previously incorporated rights due to issues of public safety, but the Court found this point irrelevant to considerations of the right's historical importance. *Id.* at 782–83. Indeed, the Court noted that "[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *Id.* at 783.

47. *Id.* at 768 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

48. *Id.* at 778.

49. *Id.* at 786.

50. *Id.* (quoting *Heller*, 554 U.S. at 626).

51. *Id.* at 785 (alteration in original) (quoting Brief for State of Texas et al. as Amici Curiae Supporting Petitioners at 23–24, McDonald v. City of Chicago, 561 U.S. 742 (2015) (No. 08–1521)). The declaration of an individual right incorporated through the Fourteenth Amendment "*limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values." *Id.*

B. A TSUNAMI OF LEGAL UNCERTAINTY[52]

> *Heller* provides no categorical answer to this case. And in many ways, it raises more questions than it answers.[53]

While *Heller* and *McDonald* did provide some answers, they also managed to "throw into doubt the constitutionality of gun laws throughout the United States."[54] In doing so, the Court invited "an avalanche of litigation,"[55] which unsurprisingly followed. More troubling, with the lack of clarity and guidance, the lower courts were left to handle these cases with "no sound legal basis" to help guide them.[56]

How courts are to analyze regulations infringing on Second Amendment rights remains unanswered. Indeed, the *Heller* majority specifically references Justice Breyer's dissent in which he criticizes the majority for not establishing a level of scrutiny.[57] As the Court's "first in-depth examination of the Second Amendment," the majority states that clarity of the entirety of Second Amendment doctrine is unnecessary.[58] But Justice Breyer raises an important question: "How is a court to determine whether a particular firearm regulation . . . is consistent with the Second Amendment?"[59]

To see some of the complexities, look no further than the follow-up case in the District, *Heller v. District of Columbia* ("*Heller II*").[60] Addressing the updated restrictions passed after the initial case, *Heller II* attempted to determine whether registration requirements, restrictions on semiautomatic rifles, and prohibitions of magazines with a capacity of more than ten rounds were constitutional. Here, the majority interpreted the fact that longstanding regulations were presumptively lawful to require an investigation into whether

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52. *Id.* at 887 (Stevens, J., dissenting).

53. Kachalsky v. County of Westchester, 701 F.3d 81, 88 (2d Cir. 2012).

54. *Heller*, 554 U.S. at 722 (Breyer, J., dissenting). In his *McDonald* dissent, Justice Breyer, in reference to the accepted prohibitions from *Heller*, stated that the two cases "haphazardly created a few simple rules," with little explanation or justification. *McDonald*, 561 U.S. at 925 (Breyer, J., dissenting).

55. *McDonald*, 561 U.S. at 904 (Stevens, J., dissenting).

56. *Heller*, 554 U.S. at 722 (Breyer, J., dissenting). Justice Breyer was particularly worried about how lower courts would handle the impending legal challenges: "Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges." *Id.* at 718 (Breyer, J., dissenting). Justice Stevens predicted the *Heller* and *McDonald* decisions would "mire the federal courts in fine-grained determinations about which state and local regulations comport with the Heller right—the precise contours of which are far from pellucid—under a standard of review we have not even established." *McDonald*, 561 U.S. at 904 (Stevens, J., dissenting).

57. *Heller*, 554 U.S. at 631.

58. *Id.* at 635. Again, the majority decided Heller on narrow grounds, content to hold that "whatever else [the Second Amendment] . . . leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.*

59. *Id.* at 687 (Breyer, J., dissenting). According to Breyer, "'where a law significantly implicates competing constitutionally protected interests in complex ways,' the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* at 689–90 (Breyer, J., dissenting) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

60. 670 F.3d 1244 (D.C. Cir. 2011).

a regulation was "of newer vintage."[61] Thus, "basic registration" of handguns was constitutional, requiring no legal analysis due to a deeply rooted history.[62] Registration requirements that were "novel," and restrictions on semiautomatic rifles and large-capacity magazines demanded more analysis.[63] In these instances, the majority concluded that intermediate scrutiny should apply.[64]

The dissent, written by then-Judge Kavanaugh, believed *Heller* prohibited the use of any of the traditional tiers of scrutiny analyses and, instead, mandated a historical investigation alone.[65] Judge Kavanaugh may have been the one member of the judiciary who felt the two prominent Second Amendment cases provided clarity: "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."[66] The Court certainly could have made this point directly and chose not to. But, more importantly, this interpretation also places rather drastic limitations on state authority to address a modern, emerging threat of gun violence.[67]

This standard of review issue has important implications for the other questions left unanswered by the *Heller* decision. The who, what, when, and where of Second Amendment protections leave many potential regulations in limbo, particularly when those regulations invoke the longstanding prohibitions that *Heller* declared presumptively lawful; for example, consider the presumptively lawful prohibition of the mentally ill.

In *Tyler v. Hillsdale County Sheriff's Dep't.*, the Sixth Circuit struggled to determine whether the state could permanently ban a man from owning firearms because he was involuntarily committed for mental illness thirty years prior.[68] Here, there was a confluence of *Heller's* newly described individual right conflicting with its acceptance of prohibiting the mentally ill from exercising

61. *Id.* at 1253.

62. *Id.*

63. *Id.* at 1255–56. Novel registration requirements included training, applicants appearing in person, and background checks every six years. *Id.* at 1255.

64. *Id.* at 1256–58. Ultimately the court remanded the registration requirements for more evidence that they advanced the government's interest. *Id.* at 1258.

65. *Id.* at 1271 (Kavanaugh, J., dissenting).

66. *Id.* Thus, according to then-Judge Kavanaugh, the tiers of scrutiny that have been applied to many enumerated constitutional rights are simply a form of weighing the interests of the state and the individual against each other. *Id.* at 1280–81.

67. For example, the Ninth Circuit found no historical guidance for evaluating the constitutionality of microstamping ammunition: "Unsurprisingly, the Second Amendment says nothing about modern technology adopted to prevent accidental firearm discharges or trace handguns via serial numbers microstamped onto fired shell casings." Pena v. Lindley, 898 F.3d 969, 973 (9th Cir. 2018). Instead, the Ninth Circuit held that "California has met its burden to show that microstamping is reasonably tailored to address the substantial problem of untraceable bullets at crime scenes and the value of a reasonable means of identification." *Id.* at 986; *see* Michael R. Ulrich, *Revisionist History? Responding to Gun Violence Under Historical Limitations*, 45 AM. J.L. MED. 188, 190 (2019) (discussing the limitations of using historical analogues for regulating in response to modern public health crises).

68. 837 F.3d 678, 681 (6th Cir. 2016).

that right. The confusion resulted in sixteen judges delivering eight different opinions using at least four different review standards.[69]

Some judges wrestled with whether involuntary commitment, particularly in the past, was an appropriate proxy for mental illness.[70] Others found it difficult to determine whether *Heller* was accepting prohibitions for those who have experienced mental illness or were mentally ill at that specific moment in time.[71] The lack of a clear standard of review only made matters worse, with intermediate and strict scrutiny being used,[72] as well as an on-off test aiming to determine whether mental illness was currently present or not.[73] Still, others took a categorical approach, finding *Heller's* acceptance of prohibitions on the mentally ill meant no test was necessary at all.[74]

Meanwhile, the debate over the role of history was particularly acute in *Tyler*. The court noted that "[o]ne searches in vain through eighteenth-century records to find any laws specifically excluding the mentally ill from firearms ownership."[75] This fact is unsurprising given the current paucity of appropriate mental health policies, effective treatment, and medical understanding. But, as Judge Moore notes in her dissent, courts have had far less trouble upholding permanent bans for felons, despite the Second Amendment ratification occurring 147 years before the first federal statute disqualifying felons from possessing firearms.[76]

So what explains the differential treatment in "who" the Amendment protects? It does not appear that history or *Heller* provides the answer. However, the differentiation of these individuals for Second Amendment rights, as opposed to other constitutionally protected rights, appears to implicitly recognize the state's compelling interest in public safety. It would be difficult to justify these limitations on any other state interest.

Justice Breyer emphasizes this balance in his dissent. He notes that, in reviewing gun control regulations, it is best to avoid presumptions of constitutionality, as in rational-basis review, or unconstitutionality, as in strict scrutiny.[77] Instead, there must be room for state regulation to protect the public

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69. *Id.* at 680–81.

70. *See, e.g.*, *id.* at 700 (White, J., concurring).

71. *See, e.g.*, *id.* at 707–08 (Sutton, J., concurring).

72. *Id.* at 692; *id.* at 702 (Boggs, J., concurring).

73. *Id.* at 708 (Sutton, J., concurring).

74. *Id.* at 714–15 (Moore, J., dissenting).

75. *Id.* at 689 (alteration in original) (quoting Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1376 (2009)); *id.* at 704 (Batchelder, J., concurring) (same).

76. *Id.* at 715 (Moore, J., dissenting).

77. *Heller*, 554 U.S. at 689 (Breyer, J., dissenting). In Justice Breyer's opinion, the majority implicitly rejects the use of strict scrutiny by approving a variety of laws that would be unsustainable under strict scrutiny analysis. *See id.* at 688 (Breyer, J., dissenting) ("[B]y broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearms sales—whose constitutionality under a strict scrutiny standard would be far from clear."). Though *McDonald* pronounced that the Second Amendment protected a

against the growing threat of gun violence while still protecting the central components of the Second Amendment right to self-defense.[78] Courts must balance these competing interests against each other.

Therefore, in constitutional inquiries, the question is not merely the scope of or impact on the right. Instead, the court must also evaluate the state's interest and to what extent the regulation furthers that interest. But empirical evidence does not necessarily support the assertion that broad prohibitions of felons and the mentally ill furthers the state's interest in protecting public health and safety.[79] According to Justice Breyer, empirical evidence plays an important role in determining whether the evidence against a legislative policy is "strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them."[80]

Scalia frames this suggestion as nothing more than "a judge-empowering 'interest-balancing inquiry.'"[81] Scalia believes that there is "no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[82] Breyer finds this assertion inaccurate: "Contrary to the majority's unsupported suggestion that this sort of 'proportionality' approach is unprecedented, . . . the Court has applied it in various constitutional contexts."[83]

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fundamental right, this hardly answers the standard of review question. The myth that all fundamental rights receive strict scrutiny has been proven false. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995). For the Fourth Amendment's protections against unreasonable searches and seizures the Court has "repeatedly refused to declare that only the 'least instructive' search practicable can be reasonable under the Fourth Amendment." *Id.* at 663 (quoting Skinner v. Railway Labor Execs' Ass'n, 489 U.S. 602, 629 (1989)). Even though the Fourth, Sixth, and Eighth Amendments have been incorporated, and therefore defined as fundamental, they do not necessarily trigger strict scrutiny application. Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 233 (2006). Even fundamental First Amendment rights, such as speech and religion, do not guarantee strict scrutiny protection. In some circumstances the Court will simply look to whether the government action creates merely an "incidental burden" or a "substantial burden," rather than applying the traditional strict scrutiny framework. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1179 (1996); *see infra* Subpart II.C (discussing evaluations of content-neutral speech regulations, and neutral, generally applicable laws impacting religious freedom). Meanwhile, the majority explicitly rejects the application of rational basis as one that has never been applied to an enumerated constitutional right. *Heller*, 554 U.S. at 628 n.27. Though this suggestion is in conflict with another Scalia opinion. In *Emp't Div. v. Smith*, Scalia, writing for the Court, stated that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). Therefore, regulations that infringe on religious rights are evaluated under essentially rational basis if they are neutral, generally applicable laws.

78. *Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting).

79. *See infra* note 264–265 and accompanying text.

80. *Heller*, 554 U.S. at 702 (Breyer, J., dissenting).

81. *Id.* at 634 (quoting *id.* at 689–90 (Breyer, J., dissenting)).

82. *Id.* (quoting *id.* at 689–90 (Breyer, J., dissenting)). *But see infra* Subpart II.C.

83. *Heller*, 554 U.S. at 690 (Breyer, J., dissenting) (quoting *id.* at 634) (referencing election law, speech, and due process cases). As this Article argues, perhaps more relevant to issues of Second Amendment regulations are the cases that limit many enumerated constitutional rights in the name of public health and safety. *See infra* Subpart II.C.

Heller does provide some insight into what is protected under the Second Amendment by excluding those weapons that are dangerous and unusual, such as machine guns. Yet, there is little guidance to determine what constitutes dangerous or unusual. Returning to *Heller II*, the majority and dissent disagree over how to categorize semi-automatic rifles such as the AR-15. The majority categorizes the AR-15 as the civilian version of the M-16, which they deem dangerous and unusual.[84] The dissent, on the other hand, finds little difference between semi-automatic rifles and semi-automatic handguns, which Judge Kavanaugh believes have constitutional protection.[85]

As the Seventh Circuit notes, "what line separates 'common' from 'uncommon' ownership is something the Court did not say."[86] Many consider semi-automatic rifles, such as the AR-15, dangerous and unusual due to their prevalence in mass shootings.[87] Yet, as the majority concedes in *Heller II*, they are popular among gun enthusiasts as well.[88] In *Heller*, the fact that handguns were the most popular choice for those who arm themselves for self-defense seemed relevant, but so too did the handgun's practical advantages for self-defense in the home.[89] Beyond questions of firearms, there are questions surrounding ammunition,[90] such as armor-piercing or explosive bullets, as well as non-firearms, such as swords, machetes, and electroshock weapons such as stun guns or tasers.[91]

In terms of where the right extends, *Heller* again appears to contradict itself. *Heller* focused on restrictions in the home but held that the foundation of the Amendment was in the right to self-defense. As the Seventh Circuit rightly notes: "Confrontations are not limited to the home."[92] Indeed, they can occur anywhere. And yet, *Heller* also accepted prohibitions in "sensitive" locations without explanation.[93]

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84. Heller v. District of Columbia, 670 F.3d 1244, 1263 (D.C. Cir. 2011).

85. *Id.* at 1286–90 (Kavanaugh, J., dissenting).

86. Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015).

87. For example, an AR-15 was used in the mass shootings that took place in Newtown, Las Vegas, San Bernardino, and Parkland, among others. *See* C.J Chivers et al., *With AR-15s, Mass Shooters Attack With the Rifle Firepower Typically Used by Infantry Troops*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/interactive/2018/02/28/us/ar-15-rifle-mass-shootings.html; *see also* Scott Pelley, *What Makes the AR-15 Style Rifle the Weapon of Choice for Mass Shooters?*, CBS NEWS (June 23, 2019), https://www.cbsnews.com/news/ar-15-used-mass-shootings-weapon-of-choice-60-minutes-2019-06-23/. Though, as one *Friedman* dissent points out, handguns received protection in *McDonald*, despite being "responsible for the vast majority of gun violence in the United States." *Friedman*, 784 F.3d at 416 n.4 (Manion, J., dissenting).

88. *Heller*, 670 F.3d at 1261.

89. *Heller*, 554 U.S. at 629 ("There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.").

90. *See, e.g.*, *Heller*, 670 F.3d 1249 (addressing regulations for rounds of ammunition greater than ten).

91. *See, e.g.*, Caetano v. Massachusetts, 136 S. Ct. 1027, 1032 (2016) (Alito, J., concurring).

92. Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012).

93. *Heller*, 554 U.S. at 626–27 (without explanation it is unclear whether this is a categorical question, or whether there is a broader category of sensitive places that share certain relevant characteristics).

In considering where individuals may carry firearms and in what manner, the circuit courts have come out in many different directions.[94] Part of the confusion lies in how to interpret *Heller's* statement that the home is "where the need for defense of self, family, and property is most acute."[95] The D.C. Circuit held that carrying firearms in public must be at the core of the Second Amendment right given the foundation of self-defense.[96] Yet, the Second Circuit interprets the core right as *Heller* explicitly states it: "Second Amendment guarantees are at their zenith within the home."[97]

The circuit courts also disagreed on how to interpret the historical record in making their determinations. The D.C. Circuit found others making "hasty inference[s]" and failing to undergo the "historical digging" that *Heller* requires.[98] The First Circuit subsequently found that circuits arguing clarity in the historical record, such as the D.C. Circuit, "relied primarily on historical data derived from the antebellum South. But we find it unconvincing to argue that practices of one region of the country reflect the existence of a national consensus."[99] Given the state interest in protecting the public, the potential to increase the risk to others should be relevant, especially when an individual seeks to carry or use a firearm outside of the home. But *Heller* does not specifically provide this, or any other, reasoning.

Finally, there is an open question regarding whether the Second Amendment imposes restrictions on the government's authority to limit when an individual might access the weapons they desire to be ready to defend themselves in cases of confrontation. *Heller* states that "laws imposing conditions and qualifications on the commercial sale of arms" are presumptively lawful, but without providing information about what qualifies.[100] For example, a recent case analyzed a ten-day waiting period.[101] *Heller* provides no definitive answer on how to weigh the potential of a "cooling off" period that might limit

94. Even the Ninth Circuit has had difficulty determining how to analyze cases regarding carrying firearms in public. In *Peruta v. San Diego*, an en banc panel of the Ninth Circuit held that "the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public," while refusing to factor in that carrying firearms openly in public was also essentially prohibited. 824 F.3d 919, 939 (9th Cir. 2016). In a subsequent case, *Young v. Hawaii*, a three-judge panel of the Ninth Circuit held, "the right to bear arms must guarantee *some* right to self-defense in public," and with *Peruta* determining that concealed carry received no protection, the court concluded that open carry must be protected. 896 F.3d 1044, 1068 (9th Cir. 2018). Interestingly, in both cases, the Ninth Circuit avoids questions of standards of review, with the former case determining there is no Second Amendment protection at all, *Peruta*, 824 F.3d at 939, and the latter striking down the open carry regulation because " [t]he typical, law-abiding citizen in the State of Hawaii is therefore entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense." *Young*, 896 F.3d at 1071.

95. *Heller*, 554 U.S. at 628.

96. Wrenn v. District of Columbia, 864 F.3d 650, 657 (D.C. Cir. 2017).

97. Kachalsky v. County of Westchester, 701 F.3d 81, 89 (2d Cir. 2012).

98. *Wrenn*, 864 F.3d at 661–62.

99. Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018) (citation omitted).

100. *Heller*, 554 U.S. at 626–27.

101. Silvester v. Harris, 843 F.3d 816 (9th Cir. 2016), *cert. denied sub nom.* Silvester v. Becerra, 138 S. Ct. 945 (2018).

an individual engaging in hasty purchases aimed to harm themselves or others against an individual who may fear there is a credible and impending threat to their safety.

While the judiciary debates the various aspects of *Heller*, *McDonald*, and the clarity of the historical record, some circuits have coalesced around a two-part test for analyzing regulations implicating Second Amendment rights: (1) Whether the law in question burdens conduct protected by the Second Amendment, and (2) if so, the court must determine and apply the appropriate level of scrutiny.[102] What is particularly interesting about this test—which, importantly, still does not itself answer questions such as the standard of review or the scope of protections—is that the determination of whether the conduct is protected is not the end of the analysis. Just as Justice Breyer stated in his *Heller* dissent, for many circuit courts, determining whether the conduct receives Second Amendment protection has become the beginning of the inquiry, rather than the end.

The lower courts have struggled with how to develop and apply a legal framework for this relatively new fundamental right, and "frustrated by the indeterminacy of historical inquiry and puzzled by the categorizations suggested by Justice Scalia, have steered in other directions."[103] Despite a lack of consensus around the specifics of Second Amendment jurisprudence, there does appear to be an overwhelming desire to approach firearm regulations with pragmatism.[104] Many courts, therefore, have arrived at a similar point to Breyer, which is "to show that whatever interest the colonial lawmakers might have had in assuring the ability of homeowners to defend themselves with their 'Arms,' that interest shared space with a recognition of the need for public safety-related regulations of firearms."[105] Given the desire for pragmatic approaches to public safety, the courts should look to public health law precedent for more clarity.[106] As seen by the wide range of lower court struggles, it certainly cannot be less helpful than what the courts are using now.

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102. United States v. Chovan, 735 F.3d 1127, 1134–36 (9th Cir. 2013) (citing to the First, Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuits, which have applied something akin to the two-part test). However, even in many cases where this precedent has been set, judges have written to say that they believe this test does not adequately follow *Heller* or give Second Amendment rights proper protection. Tyler v. Hillsdale, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring in most of the judgment).

103. Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706 (2012).

104. *Id.* at 707 ("[T]he lower courts' decisions strongly reflect the pragmatic spirit of the dissenting opinions that Justice Stephen Breyer wrote in *Heller* and *McDonald*.").

105. Linda Greenhouse, *Weighing Needs and Burdens: Justice Breyer's* Heller *Dissent*, 59 SYRACUSE L. REV. 299, 301 (2008).

106. "[C]ourts should not read *Heller* like a statute rather than an explanation of the Court's disposition." Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015).

II. THE PUBLIC HEALTH LAW FRAMEWORK: POLICE POWER AND INDIVIDUAL RIGHTS

While some of the lower courts appear to follow Breyer's pragmatic approach, they do so without reference to Breyer's opinion or an established area of case law. But this Part aims to demonstrate that there is a robust foundation of case law that supports the balance between individual rights and the government's authority to limit those rights under certain circumstances for the protection of public health and safety. A public health law framework identifies whether there is a threat to public health and safety amenable to government action, whether that action has a reasonable chance to mitigate the threat, and if there is an appropriate balance between the burdens on individual rights and benefits to the public.

Using a public health law framework is a logical choice given that any state's interest in limiting Second Amendment rights is likely to relate to public health and safety. Indeed, there is a strong theoretical foundation for the government's role in protecting public health and safety. Social contract theory, government legitimization, self-governance, and human rights all support the government's protection of public wellbeing.

Examining the government's ability to limit individual rights in the name of the greater good is nothing new. Public health has been essential to the country's evolution, while public health law cases have played a key role in constitutional development. There is a long history of the judiciary acknowledging the government's police power authority to protect public health and safety while acting as a check to protect from abuse.[107] Thus, public health law cases provide a useful resource for jurists, policymakers, and scholars searching for clarity about Second Amendment protections and the constitutionality of firearm regulations.

Therefore, the utilization of a public health law framework provides jurists with a stronger justification for their pragmatic approach. Focusing on how reasonable the government action is given the threat to the public, the chance of mitigating that threat, and the burden placed on constitutional rights illustrates that the declaration of an individual right to keep and bear arms tells us little about what the government can do to combat gun violence. As this Part will demonstrate, no rights are absolute. The government infringes on some of our most cherished and protected rights in the name of public health and safety.

This framework should help to combat the notion that lower courts who opt for reasonableness in their analysis are simply "failing to protect the Second

107. It is important to note that the judiciary has certainly not always been successful in providing an appropriate check on unjustifiably expansive police power authority. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927) (holding that the government may, consistent with the Constitution, involuntarily sterilize an "imbecile" in the name of public welfare).

Amendment to the same extent that they protect other constitutional rights."[108] Instead, a public health law framework properly highlights the state interest in combating the rising epidemic of gun violence, rather than focusing solely on the scope of Second Amendment protections. Despite the claim that lower courts are "resisting this Court's decisions in *Heller* and *McDonald*,"[109] the only position that comes close to consensus is that these decisions provide little clarity. Given the vast Second Amendment challenges and a growing gun violence problem, a public health law framework will hopefully provide much-needed guidance.

A. SALUS POPULI SUPREMA LEX ESTO: THE WELFARE OF THE PEOPLE AS THE SUPREME LAW

> No man is an island, entire of itself; every man is a piece of the continent, a part of the main.[110]

The notion that any person must, at times, submit their individual rights for the greater good is not a novel concept. As Aristotle wrote, "the man who is isolated—who is unable to share in the benefits of political association, or has no need to share because he is already self-sufficient—is no part of the polis, and must, therefore, be either a beast or a god."[111] Thus, the ability of any individual to truly isolate themselves and flourish is an unrealizable myth. Instead, as John Locke put it, the formation of civil society was for the "mutual *Preservation* of their Lives, Liberties, and Estates."[112] Each individual who is willing to make this agreement is then entitled to share in the benefits of that greater good.

Some scholars have argued that not only is a government authorized to act in the name of public health and safety, they are obligated to do so.[113] Under

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108. Silvester v. Becerra, 843 F.3d 819 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting). Justice Thomas has claimed that those courts upholding firearm restrictions are in fact acting in defiance of the Supreme Court. *Id.* at 951 (Thomas, J., dissenting). Some lower court jurists have also derided the approach of sister circuits striking down firearm regulations without conducting what they would consider a proper analysis. Wrenn v. District of Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017). In academia, some legal scholars have focused on lower courts' misuse of review standards. Some argue still that "[s]ince fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment freedom of press and freedom of speech should also be applied to Second Amendment rights." Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 455 (2011). Still others have argued that the popular two-prong approach misapplies intermediate scrutiny, leading to unconstitutional deference without demanding proper justification. *See* Nelson Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM URB. L.J. 1617, 1629 (2012) (stating that the *Heller II* majority were too deferential to the government and the regulations in question lacked adequate justification).

109. *Silvester*, 138 S. Ct. 945, 950 (Thomas, J., dissenting).

110. John Donne, *Meditation XVII*, *in* DEVOTIONS UPON EMERGENT OCCASIONS (1624).

111. I ARISTOTLE, POLITICS § 14–15, at 6–7 (Ernest Barker trans., Oxford Univ. Press, 2009).

112. WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 15 (2009).

113. *Id.* ("According to historian Ronald Peters, although the social contract theorists and adherents disagreed about many things, they concurred that 'the only end of civil society is the common good. And the

social contract theory, a government is only legitimate if it secures the common good.[114] Individuals agreed to obey the laws and restrictions on individual rights if the government protected them and government pursuits benefited the whole of the people.[115] The failure to protect the public would undermine the legitimacy of the government by violating the terms of its compact.[116]

The promotion of public health, such as protection from epidemics, has always been a critical component of a society's survival.[117] In this country, the states' authority to protect their citizens comes from the police power. The police power is the sovereign, inherent, and broad authority of the state to protect its people.[118] In his treatise on public health law, Lawrence Gostin defines police power as "the inherent authority of the state (and, through delegation, local government) to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people."[119] It follows closely, though not strictly, with John Stuart Mill's harm principle: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[120]

Given the historical foundation in political philosophy between representative governance, civil society, and public health, it should be no surprise that the states' inherent police power authority predates the Constitution. Public health is "a precondition to social life, one of the goods a society must aim for and achieve if it is to survive and attain other ends."[121] Therefore, the protection of public health played a key role in the evolution of the colonies before the Constitution, as well as a central part of this country's development into a global superpower. In the Constitution's Framing Era, the protection of public health would have been necessary for the survival of the newly formed country.[122]

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sine qua non of the common good is public safety, *salus populi suprema lex*.'" (quoting Ronald Peters Jr., The Massachusetts Constitution of 1780 103–04 (1978)).

114. *Id.* at 11.

115. Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 308–12 (1993).

116. *Id.* at 309. Parmet also noted that "under social contract theory, government was not only entitled, but also obligated, to protect public health." *Id.* at 314.

117. PARMET, *supra* note 112, at 10–11. As Parmet points out, infectious disease has not had just a narrow impact on health alone. The impact of an epidemic is felt by those who never become infected. "Wars could be won or lost, governments empowered or deposed, economies strengthened or destroyed." *Id.* at 10.

118. *See* Parment, *supra* note 115, at 272 (stating that the police power was considered a plenary source of state authority).

119. LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 87–88 (2d ed. 2008).

120. JOHN STUART MILL, ON LIBERTY 6 (1880).

121. PARMET, *supra* note 112, at 11.

122. Parmet, *supra* note 115, at 312–14. Parmet noted that "[t]his view of rights would have been compatible with the era's public health practices, which limited and even impounded property in order to protect the public health." *Id.* at 317. The obligation to protect the public health may have even been self-evident to the Framers. *Id.* at 319.

The focus on the protection of health even played a central role in developing international governance structures through the human rights framework. The Universal Declaration of Human Rights states that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family."[123] The International Covenant on Economic, Social, and Cultural Rights went on to recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[124] And in General Comment 14, this was further explained:

> The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body . . . . [T]he entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.[125]

The human rights framework recognizes the protection and promotion of health is essential for the promotion of human rights because "[h]ealth is a fundamental human right indispensable for the exercise of other human rights."[126]

This background helps to highlight the universality of health and the essential part it plays in self-determination, representative governance, and the formation and flourishing of civil society. Health is essential for everyone regardless of their sex, race, religion, age, wealth, or geographic location. The indispensable nature of health is why another political philosopher, Henry Shue, prioritizes health above other important rights. Shue explains that "[w]hen a right is genuinely basic, any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating, cutting the ground from beneath itself."[127] In other words, to sacrifice rights that protect and promote one's health in furtherance of another right, such as the right to vote or the right to practice their religion freely, would be self-defeating. Without a minimum level of health, individuals are unable to enjoy any other rights.

Therefore, the protection of public health is *also* a means of protecting and enabling the enjoyment of *individual* rights as well. To protect public health is necessary to put other rights into effect and allow individuals to pursue the lives they deem worthy.[128] Ultimately, "[n]o one can fully, if at all, enjoy any right

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123. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 25, ¶ 1 (Dec. 10, 1948).

124. G.A. Res. 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights, art. 12 (Jan. 3, 1976). In General Comment 14, it was clarified that this reference is "not confined to the right to health care," and instead "embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health." U.N., Comm. on Economic, Social & Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶ 4, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment 14].

125. General Comment 14, *supra* note 124, at ¶ 8.

126. *Id.* at ¶ 1.

127. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 19 (2d ed. 1996).

128. Parmet, *supra* note 115, at 315.

that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy and active life."[129]

We often focus on the rights of individuals, and certainly, that is a critical exploration in the debate over Second Amendment rights. Yet, a public health lens highlights the fact that the health of an individual and their ability to enjoy their rights is dependent on the actions of others. The possibility of any individual to isolate themselves from the impact others have on their health and ability to live their lives is nearly impossible, especially in modern times.[130] Thus, the primary rule of organized society is to embrace the fact that we all are better off working with and for each other.

Due to the lengthy historical analysis included in *Heller*, debates of Second Amendment rights often include extensive examinations of laws, rights, and practices from centuries ago. Examination of the historical and theoretical foundation of the police power and the authority of the state to act in the name of public health and safety are critical to balance against those historical rights-focused inquiries. There is a long history of protecting individual rights, but there is also a well-established history of curtailing those rights in pursuit of public health and safety.

B. FOUNDATIONAL CASES IN PUBLIC HEALTH LAW

The examination of public health law doctrine in the context of Second Amendment rights is logical due to the public health and safety implications of gun rights and gun violence. But health law cases are also useful because they have historically "influence[d] the direction of larger doctrines and play[ed] a paramount role in scholarly debates over the legitimacy of judicial review and the proper methodology for constitutional interpretation."[131] Therefore, an examination of cases implicating public health considerations offers important lessons on constitutional theory.[132] Specifically, these cases examine the relationship between individual rights and the body politic and how this determines the authority of the state to limit individual rights in the name of public health and safety.

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129. SHUE, *supra* note 127, at 24.

130. Jane E. Jordan et al., *Legal, Operational, and Practical Considerations for Hospitals and Health Care Providers in Responding to Communicable Diseases Following the 2014 Ebola Outbreak*, 23 U. MIAMI BUS. L. REV. 341, 344 (2015) ("[W]e live in a world where 'we are all connected by the air we breathe,' the water we drink, the food we eat, and by airplanes that can bring disease from anywhere to anywhere in a single day." (quoting CDC Director Thomas Frieden, Press Conference on the First Ebola Case Diagnosed in the United States (Sept. 30, 2014), https://www.cdc.gov/media/releases/2014/t0930-ebola-confirmed-case.html).

131. Parmet, *supra* note 115, at 269.

132 *See, e.g.*, Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 S.M.U. L. REV. 391, 403–12 (2018) (using contagious disease control measures such as quarantine to illustrate and analyze requirements for substantive and procedural due process).

It is important to note that a focus on public health and the law's impact on it is to inform, not determine, legal outcomes.[133] The point is not that public health is the "only or most privileged legal norm, only that it is among those that are and ought to be woven into the fabric of legal culture and legal decision making."[134] It is to highlight that public health is an important legal value and to ensure its treatment is in line with other legal values.[135] But, equally important is the fact that consideration of public health is not establishing a new legal norm. As this Subpart will demonstrate through cases that stretch back over the country's history, an emphasis on public health as a legal value is as well-established as other widely accepted values like fidelity to precedent.[136]

One inherent difficulty in utilizing a public health law framework may be in determining what qualifies under the umbrella of public health and public health law.[137] And this concept may not be static. Early on, it related most tangibly to epidemics of contagious diseases.[138] But a public health law framework "extends its reach beyond those topics and questions that have traditionally been viewed as falling within the boundaries of public health law."[139] By focusing on risks that are amenable to government action, public health law now contains issues as varied as Chronic Traumatic Encephalopathy, natural disasters, employee wellness programs,[140] and, as this Article contends, firearm shootings.

At its core, public health law is not distinct from many other areas of constitutional law. It focuses on determining what the government is authorized

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133. *See generally* Wendy K. Mariner, *Toward an Architecture of Health Law*, 35 AM. J.L. & MED. 67 (2009).

134. PARMET, *supra* note 112, at 57.

135. *Id.*

136. As Parmet argues, "population-based legal analysis treats the promotion of public health as an important norm, but it goes further and asserts that this good is both a rationale for law and a chief value of law." *Id.* at 56. Thus, "the protection of population health is a goal of law itself and not simply of public health law." *Id.* at 51.

137. For example, here is one of the broader definitions of public health:

> Public health is the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts for the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygiene, the organization of medical and nursing service for the early diagnosis and preventive treatment of disease, and the development of the social machinery which will ensure to every individual in the community a standard of living adequate for the maintenance of health, so organizing these benefits as to enable every citizen to realize his birthright of health and longevity.

Charles E. A. Winslow, *The Untilled Fields of Public Health*, 51 SCI. 23, 30 (1920); *see* Wendy K. Mariner, *Law and Public Health: Beyond Emergency Preparedness*, 38 J. HEALTH L. 247, 252 (2005) ("Given such a broad scope, public health might be equated with any public policy that serves in any way to prevent physical or mental harm or to maintain or improve health.").

138. PARMET, *supra* note 112, at 51.

139. *Id.*

140. *Id.* at 159, 191, 207.

to do and what limitations individual rights place on government action.[141] Protecting public health and safety would not be possible without some government intrusion into private action.[142] And, indeed, the state is authorized to do so through the police power. Consequently, the tension lies not only between the government and the individual, but also between the individual and other citizens.[143]

But these tensions have been dealt with since the country's founding. In fact, in early cases, the Court deemed the police power quite broad. In the 1824 case *Gibbons v. Ogden*, Chief Justice Marshall recognized the inherent police power as "a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government."[144] As a result, early police power decisions looked primarily at whether the state action was actually for public health.[145]

In the 1873 *Slaughter-House Cases*, the Supreme Court acknowledged the historical acceptance of the police power and "the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community."[146] The Court acknowledged the connection between the protection of public health and safety and the enjoyment of individual rights and liberties. According to the Court, the exercise of police power was not only critical to "the security of social order," but also to "the enjoyment of private and social life,

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141. Michael R. Ulrich, *Law and Politics, An Emerging Epidemic: A Call for Evidence-Based Public Health Law*, 42 AM. J.L. & MED. 256, 260 (2016) ("[P]ublic health law means determining the appropriate balance between what the government is obligated and authorized to do to protect the public's health, and what it cannot do in terms of infringing on individual rights."); *see* Webster v. Reprod. Health Servs., 492 U.S. 490, 521 (1989) ("The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not.").

142. GOSTIN & WILEY, *supra* note 119, at 10.

143. Mark A. Rothstein, *Ebola, Quarantine, and the Law*, 45 HASTINGS CTR. REP. 5, 5 (2015) ("[T]he central ethical conflict of public health . . . [is] the balancing of individual and societal interests."). These categories are not mutually exclusive. Many consider themselves advocates for both Second Amendment rights and reasonable gun control to reduce gun violence. Meanwhile, the evolving fight between these two sides mirrors an evolution in constitutional law. The increased need for judicial review, and the development of standards of review, has been attributed to the loss of a shared vision of the public good among citizens. *See generally* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988). This evolution has also impacted public health law, where the consensus around reasonable public health measures has deteriorated as public views concerning individual responsibility have emerged as conflicting with those who believe the social determinants of health play a significant role in health outcomes.

144. 22 U.S. 1, 203 (1824). The Court provided examples such as "[i]nspection laws, quarantine laws, [and] health laws of every description." *Id.*

145. This includes cases into the *Lochner* era, where "the court continued to affirm the states' right to protect public health pursuant to the police power." Wendy E. Parmet, *Legal Rights and Communicable Disease: AIDS, the Police Power, and Individual Liberty*, 14 J. HEALTH POL. POL'Y & L. 741, 744 (1989). "[T]hrough shifting ideological coalitions and doctrinal expositions, [the Court] continued to assume that public health was a clearly knowable interest that was at the core of the police power and thus was always within the government's legitimate scope." *Id.* at 744–45.

146. Slaughter-House Cases, 83 U.S. 36, 62 (1873).

and the beneficial use of property."[147] Whereas today these values are typically characterized as conflicting, we can see that the Supreme Court historically saw them as inextricably linked.[148]

Jacobson v. Massachusetts, arguably the foundational public health law case, most directly confirmed the ability of the state to infringe on individual rights for the protection of others.[149] The Supreme Court addressed the role of police power and public health head-on in the context of compulsory smallpox vaccinations. The Court considered it uncontroversial that the police power included "such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[150] In reference to the limitation of individual rights, the Court concluded that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."[151]

The Court expressly embraced the social contract theory, finding protection of the common good essential to the basis of organized society.[152] Therefore, the Court held "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."[153] But the Court made sure to emphasize that the claim of a public health problem was not the end of any analysis. Rather, the police power only authorizes enforcement under "reasonable conditions."[154]

To help determine what police power actions were reasonable, the Court provided guidelines that largely align with common public health principles followed today.[155] Thus, the Court's analysis provides a foundation for the public health law framework.[156] The Court first determined whether there was a public health threat that warranted government action.[157] Next, the Court

147. *Id.*

148. *See, e.g.*, *id.* ("[P]ersons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State.").

149. 197 U.S. 11, 26 (1905).

150. *Id.* at 12, 25.

151. *Id.* at 26.

152. "There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Id.*

153. *Id.* at 29.

154. *Id.* at 26.

155. Lawrence Gostin has interpreted *Jacobson* to declare four overlapping values that must be considered in public health law cases: necessity, reasonable means, proportionality, and harm avoidance. Lawrence O. Gostin, Jacobson v Massachusetts *at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 579 (2005).

156. *See, e.g.*, Ulrich, *supra* note 141, at 261–62.

157. Jacobson v. Massachusetts, 197 U.S. 11, 27–28 (1905). The Court stated that this aspect of evaluation prevents arbitrary government action. *Id.* at 28. This is meant to prevent abusive government action made under false claims of a public health crisis. *See* Wendy E. Parmet, *J. S. Mill and the American Law of Quarantine*, 1 PUB. HEALTH ETHICS 210, 213 (2008) (stating that the Court would only uphold the vaccine requirement if there was evidence that smallpox was present in the community). Lawrence Gostin refers to this as the necessity

examined whether the government measure had a reasonable chance to mitigate the public health threat.[158] And finally, the Court evaluated whether the potential benefits of that government action justified the burdens on individual rights.[159]

Though the state is afforded great deference in its role as protector of public health and safety, the use of police power "might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere."[160] The judiciary's role is to look at "the necessity of the case," both in terms of the public health threat and the state measure generally, as well as the application of that requirement for any individual.[161] In *Jacobson*, the Court held that vaccinations would provide a substantial benefit given their effectiveness at preventing the spread of disease;[162] generally speaking, the vaccination presented minimal risk of harm;[163] and if someone declined, the Court did not believe a five-dollar fine was overly coercive.[164]

Jacobson provided confirmation of police power authority and the ability to limit individual rights in the name of public health and safety. Though the robust protections of individual rights may not have been quite what they are in modern jurisprudence, one might still expect that individual rights would be a definitive limitation on state action. Yet, the Supreme Court appeared to give little attention to the nature of the infringed right. When it comes to public health and safety, the Court treats the notion of infringing on individuals for the public good as well-settled in common law and constitutional analysis. The *Jacobson* Court noted:

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standard, which "requires, at a minimum, that the subject of the compulsory intervention must pose a threat to the community." Gostin, *supra* note 155, at 579. In *Jacobson*, the Court found that smallpox was prevalent and spreading in the city. *Jacobson*, 197 U.S. at 28.

158. If there is "no real or substantial relation" to public health and safety, the Court would be obligated to step in to prevent government action. *Jacobson*, 197 U.S. at 31. Instead of substituting its judgment on vaccination efficacy, the Court found that "most members of the medical profession" believed vaccination had a "decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it." *Id.* at 34; *see* Parmet, *supra* note 157, at 213 (finding that the compulsory policy could only be upheld if the vaccination could reasonably be expected to prevent the epidemic). The Court made a point to emphasize that there need not be universal consensus or certainty of prolonged efficacy to validate a public health measure. *Jacobson*, 197 U.S. at 35 ("The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive." (internal quotation marks omitted) (quoting Viemeister v. White, 97 N.E. 97, 99 (N.Y. 1904))). Ultimately, the Court upheld the use of "methods most usually employed to eradicate that disease." *Id.* at 28.

159. *Jacobson*, 197 U.S. at 28–32 (explaining that deference was due to the state authorities on the question of the efficacy of the vaccine, that substantial evidence supported its determination, and that exempting especially vulnerable children did not violate equal protection of the laws); Ulrich, *supra* note 141, at 262 n.38.

160. *Jacobson*, 197 U.S. at 28.

161. *Id.* The Court recognized that the state took measures to include an exemption for those who were "unfit subjects for vaccination." *Id.* at 30. In *Jacobson*, "the defendant did not offer to prove that, by reason of his then condition, he was in fact not a fit subject of vaccination." *Id.* at 36.

162. *Id.* at 24, 38.

163. *Id.*

164. *Id.* at 26.

> We are not prepared to hold that a minority . . . enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State.[165]

This sentiment acknowledges that whatever an individual might feel about the government or its representatives, they are inevitably going to receive at least some benefits from their governance. And, here, the Court recognizes that one cannot accept those benefits while defying reasonable requirements that protect their health and safety, as well as the rest of their community.

The investigational requirements laid out in *Jacobson* help to ensure the state cannot regulate by making unsubstantiated claims of protecting public health and safety. Constitutionally protected rights do indeed place a restraint on state action, as illustrated by the Court's requirement to examine the burdens placed on individuals. However, it is imperative to understand that the court need not determine if a right is "fundamental." This understanding is key to the use of public health law for Second Amendment analysis. The Supreme Court's declaration that the Second Amendment right was fundamental in *McDonald* does not preclude the government from infringing on it. And, perhaps more importantly, as this next section will demonstrate, court decisions to uphold regulations of fundamental rights in the name of public health and safety do not relegate the right to second-class status.

C. PUBLIC HEALTH AS A LIMITATION ON INDIVIDUAL RIGHTS

Though the police power authority to act in the interest of public health and safety has a strong foundation, individual rights can still act as a barrier to government intrusion. The declaration that the Second Amendment protects an individual right does not in and of itself tell us what limitations the right places on government action. While some may claim upholding firearm regulations relegates the Second Amendment to second-class status,[166] the government has infringed several constitutional rights, even those with fundamental status, in the name of protecting public health and safety for over a century.

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165. *Id.* at 37–38. This reasoning is similar to that provided by Justice Scalia in the majority opinion for *Employment Division v. Smith*: "that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself." 494 U.S. 872, 890 (1990).

166. Silvester v. Becerra, 843 F.3d 819 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting).

For example, vaccination laws implicate bodily integrity, religious rights, parental rights, and due process protections. And yet, they have been universally upheld by courts at every level of the judiciary. Consider, for example, the most common vaccination requirements currently found in every state that prohibit children from attending school if they do not receive the required inoculations. Unlike *Jacobson*, where smallpox presented an emerging threat, these childhood vaccination laws are preventive and do not require the community to be in the midst of an outbreak.

Zucht v. King considered compulsory child vaccination laws challenged on the basis that there was "no occasion for requiring vaccination."[167] Therefore, challengers argued the ordinance was arbitrary and violated due process.[168] Yet, the importance, fundamental status, or constitutional protections of rights was largely irrelevant. The Court confirmed that the police power grants "broad discretion required for the protection of the public health."[169] Consequently, the state's decision to delegate preventive vaccine mandates to the expertise of the Board of Health did not confer arbitrary power.[170] This distinction between the "clear and present danger" standard and the authority to prevent potential harms before they become a public crisis has important implications for state action limiting Second Amendment rights proactively.[171]

With preventive measures clearly permissible, subsequent cases focused on individual beliefs and liberties, arguing that the state could not impose vaccine requirements on individuals whose beliefs precluded them from adherence. In *Prince v. Massachusetts*, the Court acknowledged that vaccine requirements implicated religion, parental rights, and "the private realm of family life."[172] Yet, echoing *Jacobson*, the Court declared that "neither rights of religion nor rights of parenthood are beyond limitation;" therefore, parents "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds."[173] The Court explicitly rejected the argument that First Amendment protections of religious freedom can excuse someone from valid police power regulations: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[174]

This balancing of public protection and religious liberties continues into modern times, from none other than Justice Scalia, certainly not known as a bastion for overly broad state authority to infringe on individual rights. In

167. 260 U.S. 174, 175 (1922).

168. *Id.*

169. *Id.* at 177.

170. *Id.*

171. *See, e.g.*, Boone v. Boozman, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002) (rejecting the "clear and present danger" standard in a case challenging a Hepatitis B vaccination requirement).

172. 321 U.S. 158, 166 (1944).

173. *Id.*

174. *Id.* at 166–67. Subsequent cases appealed to the Supreme Court were denied certiorari. *See, e.g.*, Brown v. Stone, 378 So. 2d 218 (Miss. 1980), *cert. denied*, 449 U.S. 887 (1980).

Employment Division v. Smith, Justice Scalia wrote for the majority and declared, "The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[175] While protections for individual rights may have strengthened since the time of *Jacobson*, here we see fundamental enumerated rights can still be limited in the name of public health and safety.

And despite the evolution of judicial protections, Justice Scalia's majority opinion continues to harken back to these classic public health law cases. Justice Scalia writes "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" before referencing the holding in *Prince* that religion did not shield the challenger from an otherwise valid law.[176] And the majority echoes the sentiments of the *Jacobson* Court when stating the subjugation of individual rights for the common good is an "unavoidable consequence of democratic government[,] [which] must be preferred to a system in which each conscience is a law unto itself."[177] In other words, while individual rights and interests are important and deserving of protection, they cannot be allowed to jeopardize protections for the common good.

Sticking with First Amendment protections, speech doctrine has allowed limitations on these enumerated rights in furtherance of public protection. This is notable given that speech doctrine is a popular destination for jurists and scholars in search of guidance for Second Amendment analysis.[178] While free speech does often receive strict scrutiny analysis, the increased protection is not ubiquitous.[179] Instead, concerns of public wellbeing play a role. There are simple examples, such as yelling "fire" in a crowded theater, fighting words, and real

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175. 494 U.S. 872, 885 (1990) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)). In that case, Justice Scalia explicitly rejected the *Sherbert* test, which requires a compelling state interest akin to strict scrutiny. *Id.* at 884–85.

176. *Id.* at 879–80 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

177. *Id.* at 890. This sentiment echoes *Jacobson*, which held that if individuals were able to assert rights to exclude themselves from valid public health measures "the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population." 197 U.S. 11, 38 (1905).

178. Joseph Blocher, *Second Things First: What Free Speech Can and Can't Say About Guns*, 91 TEX. L. REV. 37, 40 (2012) ("Like the Second, the First Amendment protects the individual exercise of a right that can have enormous social costs and arguably serves a variety of values, including individual autonomy and protection of democracy."). There are some key differences between the rights that are worth noting. For example, the prior restraint doctrine includes an inherent recognition that one can remedy speech-related harm after the fact. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 70 (2012). By contrast, the harm from firearms is much more difficult, if not impossible, to remedy after the fact.

179. Winkler, *supra* note 77, at 237–38. Winkler wrote that "[p]erhaps the most preferred of all rights is the freedom of speech, the so-called First Freedom. Yet strict scrutiny is not always applied in free speech cases." *Id.* at 237. For example, content-neutral laws are subject to a more deferential standard than strict scrutiny. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968).

threats. All of which lose their protections due, at least in part, to the potential harm they may generate.

Commercial speech provides another example of speech that typically receives less judicial protection.[180] In fact, courts often evaluate commercial speech in large part through the lens of what benefits the speech affords the public. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court recognized that "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information . . . . It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed."[181] Thus, the government has broader discretion to regulate commercial speech to protect public health and safety. For example, the *Zauderer* test has been likened to rational basis review, enabling broad discretion for the government to mandate factual commercial speech to prevent commercial harms and benefit the public.[182] Therefore, a more appropriate analogy between the First and Second Amendment is the recognition that neither can, does, or should receive an elevated status that protects it from limitation in the protection of the common good.

The Fourth Amendment is another pertinent example. An enumerated, fundamental right, the Amendment explicitly requires a warrant for searches and seizures.[183] Yet, the judiciary has carved out exceptions to this explicit requirement often for public health and safety justifications. When safety is at issue, a search unsupported by probable cause may be reasonable "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[184] In fact, in *Board of Education of Independent School District No. 92 of Pottawatomic County v. Earls*, Justice Thomas wrote for the majority expanding the "special needs" doctrine to allow "*balancing* of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests."[185] In that case, the Court found that searches without warrants or even individual suspicion were constitutional given the interest in "protecting the safety and health" of those students.[186]

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180. If the speech is for commercial purposes, courts evaluate it through one of two standards that fall below strict scrutiny: the *Central Hudson* test or the *Zauderer* test.

181. 425 U.S. 748, 765 (1976).

182. The *Zauderer* test allows mandated disclosures that are factual and uncontroversial if they are reasonably related to a significant government interest. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

183. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

184. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829 (2002) (internal quotation marks omitted) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

185. *Id.* at 830 (emphasis added).

186. *Id.* at 838. In her dissent, Justice Ginsburg found this holding particularly troubling because the state was ignoring constitutional rights with no real evidence of a threat to public health or safety. In her reading of

Another constitutionally protected privacy right is access to abortion services.[187] The Court declared the right fundamental and applied the strict scrutiny standard in *Roe v. Wade*.[188] Justice Ginsburg has stated that this right is in fact about more than simply privacy: "[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[189] And yet, it is one of the most highly regulated constitutional rights.[190]

Finally, quarantine, a traditional area of public health law, is one of the most severe limitations on individual liberty the government can undertake. Quarantine involves restricting the movements of persons who have "been

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the evidence, these were invasions of privacy "with neither special dangers from, nor particular predilections for, drug use." *Id.* at 843 (Ginsburg, J., dissenting). Therefore, Justice Ginsburg believed the testing program was not only unreasonable, "it is capricious, even perverse." *Id.* (Ginsburg, J., dissenting).

187. While Justice Thomas, among others, may contend that this not a specifically enumerated right in the text of the Constitution, the right to privacy is one that carries great weight in this country across party lines. The right to privacy holds broad appeal because of libertarian ideals for small government and self-determination, while liberal ideals value privacy's connection to protecting against discrimination and ostracizing vulnerable populations. It is difficult to see how the right to an abortion can be eliminated or significantly altered without having any impact on the right to privacy. But if they were distinguished and the right to privacy was examined, there are still cases where the Court does not give the right elevated status by applying strict scrutiny. In *Lawrence v. Texas*, the Court focused on the right to privacy, explaining that the "right to liberty under the Due Process Clause gives [the petitioners] . . . the full right to engage in their conduct without intervention of the government," yet, only required a legitimate state interest, which is typically reserved for rational basis review. 539 U.S. 558, 578 (2003).

188. 410 U.S. 113, 155 (1973). Though the Court utilized the trimester framework, it is derived from the strict scrutiny standard: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* (citations omitted). Also, much of the privacy related jurisprudence appears to treat the right as fundamental. *See, e.g.*, Winkler, *supra* note 77, at 235 ("[A] line of cases, such as *Griswold v. Connecticut* and *Roe*, which clearly did recognize privacy to be a fundamental right." (footnote omitted)).

189. Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). Justice O'Connor made a similar point in *Planned Parenthood v. Casey*:

> These matters, involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

505 U.S. 833, 851 (1992) (plurality opinion). This may be why at no point in the *Casey* opinion, or any subsequent opinion, has the Court declared the right to an abortion no longer to be a fundamental right. In *Casey*, the Court specifically stated that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Id.* at 846.

190. The Court at times has even evaluated the right under what is in essence a rational basis standard of review. *Carhart*, 550 U.S. at 158. In *Carhart*, the Court stated that "[t]hough today's opinion does not go so far as to discard *Roe* or *Casey*, the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of 'the rule of law' and the 'principles of *stare decisis*.'" *Id.* at 191 (Ginsburg, J., dissenting). Thus, while the right to an abortion never had its fundamental status officially changed, in *Carhart*, the Court relied on "ancient notions about women's place in the family and under the Constitution," and stereotypes of "women's fragile emotional state." *Id.* at 183–85 (Ginsburg, J., dissenting).

exposed, or potentially exposed, to infectious disease, during its period of communicability, to prevent transmission of infection during the incubation period."[191] Therefore, the police power enables the government to involuntarily confine an individual who has not committed a crime or infected another person, and may not even be infected themselves. The right to move freely is perhaps the most important liberty interest, and yet, the authority to quarantine has been upheld by courts since the founding due to the recognition that the police power authorizes the state to take preventive measures to reduce the risk of harm.[192]

The goals of public health are often preventive rather than reactive. The public health law framework recognizes the state's ability to impose mandates to ensure the *continued* health of the community, not simply returning it to a healthy status. However, this does not and should not be interpreted to grant unfettered authority to pass any restrictions under the guise that they prevent some unforeseen threat that may theoretically arise in the future. Instead, it allows the state to pass reasonable preventive actions to known and credible threats to public health and safety.

One of the primary contentions for those arguing against firearm regulations is that the Second Amendment is afforded less protection than other constitutional rights by allowing restrictions.[193] This exploration of the range of rights impacted by regulations passed under the police power authority underscores the argument that infringing on Second Amendment rights for public health and safety places it on the same level of protection as any other constitutionally protected right. Utilization of the public health law framework clarifies that the Second Amendment, just as all rights, can be limited in certain circumstances to reduce the risk of harm to others. Therefore, the application of this framework helps to prevent placing the Second Amendment on a pedestal with protections that no other right receives.

III. GUN VIOLENCE AS A PUBLIC HEALTH EPIDEMIC

The case law supports the use of police power to regulate and limit individual rights in the name of public health and safety. However, to establish

191. GOSTIN & WILEY, *supra* note 119, at 429. This is distinguishable from isolation, which is when an individual is known to be infected. *Id.*

192. While quarantine is an accepted preventive measure, it has been used in an abusive manner throughout this country's history. *See, e.g.*, Jew Ho v. Williamson, 103 F. 10, 23–24 (N.D. Cal. 1900) (striking down a quarantine order focused on a section of the city that was inhabited by individuals primarily of Chinese descent); *see* Parmet, *supra* note 157, at 214 ("History is awash with quarantine's misuse . . . . [This includes] quarantining of female prostitutes in the USA during World War I."). Stating that quarantine is a valid use of police power does not mean it can be used without oversight. There are factors that must be considered when determining whether quarantine is justified. *See* Ulrich & Mariner, *supra* note 132, at 408 (discussing the need, for example, to factor in the characteristics of the disease and the individual).

193. *See, e.g.*, McDonald v. Chicago, 561 U.S. 742, 780 (2010) ("[The Second Amendment is not] a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees."); *see also* Peruta v. California, 824 F.3d 417, *cert. denied* 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting) (claiming that the Second Amendment is treated as a disfavored right).

that the state may infringe on Second Amendment rights in the name of public health and safety, we must first establish that the gun violence epidemic is an appropriate subject for the public health law framework. Therefore, a threshold question is whether gun violence is a public health problem that may justify infringing on Second Amendment rights. And if so, is it a public health problem amenable to preventive government action.

Proponents of gun control may label gun violence a public health crisis that necessitates a public health solution. They focus on the growing mortality and morbidity from firearms to demand government action. But others may look at instances of gun violence as random, sporadic, and micro-level harms, that are not truly amenable to prevention efforts outside of deterrence covered by criminal law. Opponents of gun control measures argue that gun violence occurs only when individuals act illegally. As the saying goes: guns don't kill people; people kill people.[194] Hence, while gun violence may be a problem, opponents of gun control claim it hardly warrants sweeping policy implicating the constitutional rights of "law-abiding" individuals. Rather, they argue that criminal law is the more appropriate response.[195]

The juxtaposition of these two stances underscores the primary problem with approaches to gun violence focused solely on criminal law enforcement: they are reactive instead of proactive. It also creates a false binary between preventive measures and criminal enforcement when both have a role to play. Criminal law is used to punish those who break the law and cause harm to others, which requires the crime and harm to have taken place before the state can punish the perpetrator. This approach, however, has hardly curtailed the growing gun violence epidemic. While criminal law may play an important role, it cannot be the sole focus of inhibiting this ever-increasing threat. By contrast, the police power is meant to enable the state to act preventively and reduce the risk of harm before it occurs.

The public health law framework focuses on public health problems that preventive government action can mitigate. This section will focus on empirical data to demonstrate that gun violence is indeed a far-reaching public health problem and that this problem can be alleviated through preventive legal

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194. James Downie, *The NRA Is Winning the Spin Battle*, WASH. POST (Feb. 20, 2018, 10:13 AM), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/02/20/the-nra-is-winning-the-spin-battle/. Giving a speech after the El Paso and Dayton mass shootings, President Trump used a variation of this refrain: "Mental illness and hatred pulls the trigger, not the gun." Michael Crowley & Maggie Haberman, *Trump Condemns White Supremacy but Stops Short of Major Gun Controls*, N.Y. TIMES (Aug. 5, 2019), https://www.nytimes.com/2019/08/05/us/politics/trump-speech-mass-shootings-dayton-el-paso.html.

195. Increasingly, gun control opponents focus more on mental illness and, more recently, video games as drivers of mass shootings. *See, e.g.*, Crowley & Haberman, *supra* note 194 ("Instead of focusing on measures to limit the sale of firearms, Mr. Trump's later remarks at the White House ticked through a list of proposals that Republicans have long endorsed as alternatives. They included unspecified action to address 'gruesome and grisly video games' and 'a culture that celebrates violence.'").

measures, justifying state use of police power authority that can minimize risk to the public.[196]

A. THE BROAD HARM OF FIREARMS: MORTALITY, MORBIDITY, AND DISPARITIES

Mass shootings, though a comparatively rare form of gun violence, garner the majority of media attention.[197] According to the Gun Violence Archive, which defines mass shootings as at least four fatal or nonfatal injuries (excluding the shooter) at the same general time and location, there have been at least 2387 mass shootings between December 2012 and February 28, 2020.[198] This amounts to over twenty-eight mass shootings per month over the span of seven years.[199] While this statistic is shocking, it is small in comparison to the incidents of gun violence that we do not characterize as mass shootings.

In 2017, nearly 40,000 people were lethally shot.[200] Mass shootings accounted for approximately 1% of those deaths.[201] By comparison, suicide represented almost 60% of those who died.[202] Worse still, the death toll from gun violence is increasing, with 2017, the most recent year for which we have data, representing the highest mortality since the CDC started tracking over fifty years ago.[203]

Firearms are also a significant contributor to youth mortality. Firearms are responsible for 87% of homicide for youths aged ten to nineteen years, and used

196. *See* PARMET, *supra* note 112, at 58–59.

197. *See Mass Shootings: Definitions and Trends*, RAND CORP. (Mar. 2, 2018), https://www.rand.org/research/gun-policy/analysis/supplementary/mass-shootings.html ("[T]here is clear evidence that the media's use of the term *mass shooting* has increased significantly over recent decades.").

198. *See* Lopez & Sukumar, *supra* note 8. This may be a broader definition of mass shootings, but not the broadest definition used. The benefit of using a broader definition is providing a more comprehensive assessment of gun violence, which is the primary objective for this Subpart of the paper. There is no consensus definition of what constitutes a mass shooting, which can make tracking and analysis difficult. *Mass Shootings: Definitions and Trends*, *supra* note 197. The relative infrequency of mass shootings, as compared to shootings generally, can also make them difficult to track. *See id.* ("Definitional issues aside, the relative rarity of mass shooting events makes analysis of trends particularly difficult."). RAND demonstrates the differences in commonly used definitions for mass shooting and how they can impact tracking. *Id.* Some common definitions of mass shooting include three fatal injuries (excluding the shooter) in public excluding crimes of armed robbery, gang violence, or domestic violence; four fatal or nonfatal injuries (excluding the shooter) in any location; four fatal or nonfatal injuries (including the shooter) in any location; and three fatal or nonfatal injuries (excluding the shooter) in any location unrelated to gangs, drugs, or organized crimes. *Id.* According to these definitions, there were 7, 332, 371, or 65 mass shootings in the United States in 2015. respectively. *Id.*

199. Lopez & Sukumar, *supra* note 8.

200. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 11.

201. Lopez & Sukumar, *supra* note 8 (437 deaths from mass shootings in 2017).

202. GUN VIOLENCE ARCHIVE, https://www.gunviolencearchive.org/ (23,854 suicides by gun in 2017) (last visited Apr. 15, 2020).

203. Mervosh, *supra* note 14; *see* Scott R. Kelger et al., *Firearm Homicides and Suicides in Major Metropolitan Areas United States, 2012-2013 and 2015-2016*, 67 MORBIDITY & MORTALITY WKLY. REP. 1233, 1234 (2018).

in a majority of youth suicides.[204] Suicide was the second leading cause of death for Americans ten to nineteen years of age in 2015–2016.[205] A small, isolated group of "troubled" individuals is not responsible for this rise. Instead, this disturbing pattern has been found across populations and geographic areas, with trends increasing in both urban and rural areas.[206]

Despite the lethality of firearms, people suffer nonfatal injuries in even greater numbers than the alarming amount of deaths caused by shootings.[207] Moreover, the impact of nonfatal injuries can last throughout a person's life, including trauma that can affect them in ways that are less visible to the naked eye. Nearly 140,000 individuals sustained nonfatal injuries by firearms in 2017,[208] which is a drastic increase from 85,000 just two years prior.[209] The vast majority of these injuries occur to individuals between fifteen and thirty-nine years of age, demonstrating the large numbers who will have to deal with the after-effects of the gunshots for years.[210] The chronic complications that result from nonfatal injuries cause survivors to experience poor quality of life and substantial morbidity through their remaining years.[211] For example, nonfatal firearm injury is a leading cause of spinal cord injuries, with more of these injuries resulting in paraplegia than other spinal injuries.[212] In fact, many of those categorized as survivors of nonfatal firearm injuries will ultimately die of consequences directly related to the firearm-related trauma they experienced.[213]

Yet, as shootings continue to increase and medical advances continue to save more and more victims, new complications are coming to light. Bullet fragments are left in shooting victims because some bullets are made to explode

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204. Kelger et al., *supra* note 203, at 1234, 1236. Firearms were responsible for 74% of all homicides in 2015–2016. *Id.* at 1234.

205. *Id.* Suicide rates have increased nationally for over ten years. *Id.* at 1236.

206. *Id.*

207. *See* GUN VIOLENCE ARCHIVE, *supra* note 202. Nonfatal injuries are a poorly understood aspect of gun violence and receive far less attention from researchers, funders, and policymakers. Trauma centers and administrative data from hospitalizations produce the majority of our current firearm-related injury data. Therefore, this data does not capture injuries that do not require hospital admission. As a result, our current statistics do not represent the full scope of firearm injuries. Bindu Kalesan et al., *Hidden Epidemic of Firearm Injury: Increasing Firearm Injury Rates During 2001 2013*, 185 AM. J. EPIDEMIOLOGY 546, 546 (2017). Moreover, once those who are admitted into a hospital are stitched up and saved, what happens next goes largely unnoticed. As Thomas Weiser, an associate professor at Stanford University Medical Center, said, "[w]e know very little about [gunshot]-trauma patients after they leave the hospital." David S. Bernstein, *Americans Don't Really Understand Gun Violence*, ATLANTIC (Dec. 14, 2017) (second alteration in original), https://www.theatlantic.com/politics/archive/2017/12/guns-nonfatal-shooting-newtown-las-vegas/548372/. With researchers estimating that there are more than a million shooting survivors in the United States, this is clearly an underdeveloped area that should be more closely examined to continue to better understand the full scope of the harm that comes from gun violence.

208. U.C. DAVIS HEALTH, *supra* note 13.

209. *Overall Firearm Gunshot Nonfatal Emergency Department Visits and Rates per 100,000*, CTRS. FOR DISEASE AND PREVENTION, https://webappa.cdc.gov/sasweb/ncipc/nfirates.html (last visited Apr. 15, 2020).

210. *Id.*

211. Kalesan et al., *supra* note 207, at 546.

212. Katherine A. Fowler et al., *Firearm Injuries in the United Sates*, 79 PREVENTATIVE MED. 5, 9 (2015).

213. Kalesan et al., *supra* note 207, at 546.

upon impact, while others may shatter in the body due to impact with bone. Physicians can remove some bullet fragments, but it has become common practice for physicians to leave fragments in the body that do not pose life-threatening risks because it can be dangerous to attempt to remove them depending on their location.[214] And, because approximately 95% of the nine billion rounds of ammunition made or imported into the United States each year have lead components, those survivors with internal fragments are now suffering problems associated with lead poisoning, such as neurological problems, kidney dysfunction, and reproductive issues.[215]

Looking at the state interest in reducing gun violence, the direct harm that comes from shootings might be sufficient, but that represents only part of the threat to public health and safety. Those who are exposed to shootings without being shot experience mental and emotional harm as well. Trauma, depression, post-traumatic stress, anxiety, and survivor's guilt can be experienced by those exposed to shootings but never shot.[216] There is growing evidence, consistent with research after the 9/11 terrorist attack, that media coverage of extreme gun violence such as mass shootings can have psychological effects on people who are far outside of the affected communities.[217] Despite the relative rarity of school shootings as compared to the number of schools in the country, a majority of high school students report concerns about a shooting taking place in their school or community.[218] Yet these harms are typically untracked, unmeasured, and, most importantly, untreated.

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214. Melissa Chan, *They Survived Mass Shootings. Years Later, the Bullets Are Still Trying to Kill Them*, TIME (May 31, 2019), https://time.com/longform/gun-violence-survivors-lead-poisoning/.

215. *Id.* For example, Colin Goddard, a survivor of the Virginia Tech shooting, had a blood lead level over eighteen times the average healthy adult, and greater than seven times the level at which the World Health Organization recommends taking action. *Id.* Consequently, toxicologists and surgeons are left to debate what to do with the fifty or more pieces of bullets left in his body. *Id.* In the meantime, Goddard has to take thirty-one pills a day as part of the process to rid his body of toxic metals. *Id.*

216. *See, e.g.*, Sarah McCammon, *The Uninjured Victims of the Virginia Tech Shootings*, NPR (Apr. 14, 2017, 3:12 PM), https://www.npr.org/transcripts/523042249?storyId=523042249?storyId=523042249. Lisa Hamp, a survivor of the Virginia Tech shooting, felt that, because she was not shot, she did not deserve to take up the time of mental health counselors when others were wounded or lost loved ones. Patricia Mazzei & Miriam Jordan, *"You Can't Put It Behind You": School Shootings Leave Long Trail of Trauma*, N.Y. TIMES (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/us/parkland-shooting-suicides-newtown-mental-health.html. She avoided treatment, which she attributes to the development of an eating disorder that she believes contributed to her infertility. *Id.*

217. Sarah R. Lowe & Sandro Galea, *The Mental Health Consequences of Mass Shootings*, 18 TRAUMA, VIOLENCE, & ABUSE 62, 62–63 (2017).

218. GIFFORDS LAW CENTER, PROTECTING THE PARKLAND GENERATION: STRATEGIES TO KEEP AMERICA'S KIDS SAFE FROM GUN VIOLENCE 12 (2018), https://lawcenter.giffords.org/wp-content/uploads/2018/03/Protecting-Parkland-Generation_3.9.18.pdf. As one fifteen-year-old student in Oregon put it: "I would say I think about the possibility of a shooting in my life regularly." Liam Stack, *"I Think About It Daily": Life in a Time of Mass Shootings*, N.Y. TIMES (Dec. 3, 2015), https://www.nytimes.com/interactive/2015/12/03/us/mass-shootings-fear-voices.html. With variation in gun control throughout the country, many schools and school systems have turned to trainings and drills meant to help prepare students, teachers, and staff in how to respond if there is an active shooter. GIFFORDS LAW CENTER, *supra*, at 12–14; *see also* Adam K. Raymond, *How Active Shooter Drills Became a Big (and Possibly Traumatizing) Business*, MEDIUM (Sept. 12, 2018),

These numbers reflect the substantial burden and harm the public suffers due to gun violence. But the burden and harm are not distributed equitably throughout the country. Gun violence disproportionately impacts ethnic and racial minorities, which is a significant factor in the overall disparities in health outcomes for those populations. For example, young black males suffer significantly from the gun violence epidemic, facing gun homicide rates ten times higher than young white males.[219] Overall life expectancy loss for blacks in the United States is twice as high as whites, and this disparity in life expectancy is primarily due to the firearm homicide rate for blacks under the age of twenty.[220] Overall, blacks suffer firearm injuries at four times the rate of whites, which also contributes to shorter lifespans that are likely of lower quality.[221]

Firearms also have an often-deadly impact on intimate partner violence, disproportionately impacting women.[222] The most common weapon used in intimate partner homicide, both for women and men, is a firearm.[223] The Violence Against Women Act placed firearm purchasing and possession restrictions on those convicted of a domestic violence offense and certain individuals under domestic violence restraining orders. Yet, the restraining orders only cover three types of relationships: spouses, cohabitors, and couples

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https://gen.medium.com/the-response-to-school-shootings-may-be-a-misfire-active-shooter-drills-teachers-students-6acb56418062. Yet, these trainings often create more fear and anxiety than a sense of prepared ease. *See* GIFFORDS LAW CENTER, *supra*; *see also* Alia E. Dastagir, *"Terrified": Teachers, Kids Hit Hard by Shooter Drills*, USA TODAY, https://www.usatoday.com/story/news/investigations/2019/03/22/indiana-shooter-drill-lockdowns-mock-active-shooters-traumatic/3247173002/ (last updated Mar. 22, 2019, 8:06 PM); Raymond, *supra*. During a surprise active shooter training in Virginia, an eighth-grade student spontaneously texted her mother "I love you." Michael O'Connor, *"She Literally Thought She Was Going to Die": Short Pump Middle School Held Unannounced Active Shooter Drill Tuesday*, RICHMOND-TIMES DISPATCH (May 31, 2018), https://www.richmond.com/news/local/she-literally-thought-she-was-going-to-die-short-pump/article_0b10515f-6e55-5710-aafe-ce0a350778dc.html. It was later that her mother found out she sent the text because "[s]he literally thought she was going to die." *Id.*

219. Ben Green, Thibaut Horel & Andrew V. Papachristos, *Modeling Contagion Through Social Networks to Explain and Predict Gunshot Violence in Chicago, 2006 to 2014*, 177 J. AM. MED. ASS'N INTERNAL MED. 326, 327 (2017).

220. Bindu Kalesan et al., *Cross-Sectional Study of Loss of Life Expectancy at Different Ages Related to Firearm Deaths Among Black and White Americans*, 24 BMJ EVIDENCE-BASED MED. 55, 56 (2018). Life expectancy for black males is five years lower than that of white males. Fowler et al., *supra* note 212, at 10. Firearm homicides account for approximately 14.5% of life years lost before age sixty-five for black males, whereas they account for only 1.2% of the life years lost for white males. *Id.*

221. Kalesan et al., *supra* note 207, at 550.

222. In 2013, 53% of intimate partner homicides perpetrated against females involved firearms, with the next most commonly used weapon, knives, used in 19%. April M. Zeoli et al., *Risks and Targeted Interventions: Firearms in Intimate Partner Violence*, 38 EPIDEMIOLOGIC REV. 125, 125 (2016). Men are comparatively less impacted by firearms in intimate partner violence, with firearms used in 40% of intimate partner homicides against males and knives used 38% of the time. *Id.* While intimate partner violence historically focused primarily on married couples, researchers have expanded the scope of relationships covered. Susan B. Sorenson & Devan Spear, *New Data on Intimate Partner Violence and Intimate Relationships: Implications for Gun Laws and Federal Data Collection*, 107 PREVENTIVE MED. 103, 103 (2018).

223. Sorenson, *supra* note 222, at 104.

with a child.[224] This federal policy aiming to keep firearms out of the hands of abusive individuals notably excludes casual dating relationships.[225] This oversight is problematic, especially given that research suggests that over 80% of incidents of intimate partner violence occurred in non-marital relationships.[226] As with many instances of violence, the lethality firearms means their presence often increases the potential harm to victims and, indeed, intimate violence perpetrators' access to firearms is associated with increased severity.[227]

The data demonstrate that the gun violence epidemic is a substantial issue impacting public health and safety. A public health perspective offers a broader understanding of the harm and threat firearms present, as they contribute significantly to the mortality, morbidity, and health disparities in this country. Yet, harm alone does not necessarily justify state action limiting individual rights. The public health law framework also requires that the harm responds to mitigation efforts. Emerging research establishes that proper regulatory efforts can indeed alleviate threats from gun violence.

B. A PUBLIC HEALTH THREAT AMENABLE TO MITIGATION

1. Prevention: A Contagion Theory of Gun Violence

A public health approach to gun violence requires that there are public health solutions to prevent and minimize the impact of gun violence. Opponents of firearm regulations who see gun violence as a random and sporadic tragedy unsuited to prevention efforts are unlikely to view limits on Second Amendment rights as permissible. But what if gun violence was not so random and sporadic after all? Part of the police power authority to take actions limiting constitutional rights lies in the ability of those state actions to minimize the risk of harm to the public. Knowing how diseases can spread, for example, makes it easier for the government to justify limiting individual rights to prevent the spread of that disease. Thus, gun violence sharing similar characteristics, such as predictable behavior more responsive to preventive measures, would be constitutionally relevant.

Growing evidence suggests gun violence does indeed share important characteristics with contagious diseases, spreading in concentrated networks. Gun violence can become concentrated in certain populations, such as young

224. *Id.* at 107.

225. *Id.*

226. *Id.* at 104.

227. *Id.* The impact of firearms on intimate partner violence is likely greater, given their role in nonfatal instances is less understood. Given the lethality of firearms, the mere presence of one in the home can often accompany feelings of fear, intimidation, and coercion. Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 TRAUMA, VIOLENCE, & ABUSE 431, 437 (2018). One study estimated that 5.5 million women have been threatened by an intimate partner with a gun or had a gun used against them. *Id.* Yet, in a survey of nearly 39,000 participants, 7.4% said they were not in a safe place to answer questions about domestic violence. *Id.* Given that those experiencing abuse are likely to provide this response, there is strong evidence to support the conclusion that these numbers are underestimates.

black males, as discussed above, or in particular geographic regions.[228] For example, in a study of nonfatal gunshots in Chicago from 2006 to 2014, more than 70% of the victims could be located in networks containing less than 5% of the city's population.[229] The concentration of gun violence and spread through social networks increases the predictable nature of gun violence in certain communities. Consequently, the potential for effective government action through targeted intervention increases as well.

The diffusion of gun violence follows an "epidemic-like process of social contagion that is transmitted through networks by social interactions."[230] Just as exposure to a contagious disease increases the risk of becoming infected, the probability of becoming a victim of gun violence is strongly associated with exposure to gunshot victims.[231] Thus, greater exposure to gunshot victims within a social network increases the likelihood that an individual will become a victim themselves.[232] Importantly, these findings persist even after controlling for individual risk factors and neighborhood-level effects.[233] Therefore, state action that decreases the risk to any individual has the cumulative effect of potentially reducing the risk to those in their social network as well.[234]

The risk can increase even without direct contact with a victim. Association with an individual who knows someone else who has been a victim of gun violence also increases the risk of being shot.[235] One study looked at 11,123 gunshot violence episodes, examining connected chains of gun violence through network cascades.[236] The authors estimated that over 63% of the gun violence

228. Andrew V. Papachristos et al., *Tragic, but Not Random: The Social Contagion of Nonfatal Gunshot Injuries*, 125 SOC. SCI. & MED. 139, 139 (2015); *see also* Green et al., *supra* note 219, at 331.

229. Papachristos et al., *supra* note 228, at 143.

230. Green et al., *supra* note 219, at 331. The contagion model of gun violence helps to explain how one of two individuals with identical risk factors becomes a murder victim while the other does not. Papachristos et al., *supra* note 228, at 140.

231. Papachristos et al., *supra* note 228, at 147.

232. *Id.*

233. *Id.* at 148.

234. The impact of gun violence, besides becoming a victim, may be spread in other ways through social networks. For example, exposure to neighborhood violence is associated with reductions in test scores, as well as increases in stress, depression, and aggression that can lead to disruptive classroom behavior. Julia Burdick-Will, *Neighborhood Violence, Peer Effects, and Academic Achievement in Chicago*, 91 SOC. OF EDUC. 205, 205 (2018). Evidence shows that test scores generally drop for students in classrooms with large numbers of students from violent neighborhoods. *Id.* at 206. Therefore, as students flee from the unaddressed violence in their neighborhoods, the impact of that violence is taken with them affecting broader numbers of children. In fact, violence appears to be the primary driver motivating students to attend schools outside of the community where they live. Julia Burdick-Will, *Neighbors but Not Classmates: Neighborhood Disadvantage, Local Violent Crime, and the Heterogeneity of Educational Experiences in Chicago*, 124 AM. J. EDUC. 37, 39 (2017). Therefore, the impact of gun violence can spread through broader communities in various ways. This creates greater justification for state intervention, as well as a more expansive view of the potential benefits from limiting gun violence.

235. Papachristos et al., *supra* note 228, at 148.

236. Green et al., *supra* note 219, at 330.

was attributable to social contagion.[237] This data is particularly troubling considering an individual has a 99.85% chance of having a gun violence victim in their social network.[238] Therefore, as gun violence continues to grow and spread throughout the country, this contagion poses an increased risk to us all.

2. *Mitigation: Evidence of Effective Firearm Regulations*

Gun violence is clearly a significant public health problem and one that appears to have some predictive characteristics making it amenable to government intervention. Moreover, there is growing evidence that the law can have a significant impact on subduing or increasing gun violence. This suggests government action may be warranted and constitutional in certain circumstances depending on the specifics of the regulation.

Consider mass shootings. When a gunman opened fire in downtown Dayton, Ohio, he shot his weapon for only thirty seconds.[239] Yet, he was still able to strike twenty-six individuals, killing nine, using a magazine that held one hundred rounds of ammunition.[240] The majority of high-fatality mass shootings involve large-capacity magazines.[241] As a result, some states have restricted large-capacity magazines, and evidence suggests these bans have the potential to benefit public health and safety in two ways: both by lowering the incidence of mass shootings as well as reducing fatalities per incident.[242]

Homicide rates, beyond those from mass shootings, can also be influenced by firearm regulatory regimes. For example, lax laws related to carrying a firearm in public, such as shall-issue laws that remove discretion from public carry licensing authorities, are associated with higher handgun homicide rates.[243] Conversely, universal background checks and laws prohibiting firearm possession for individuals convicted of violent misdemeanors were associated with significant reductions in homicide rates.[244] Permit-to-purchase

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237. *Id.* The study was able to utilize these cascades to identify how individuals who may have had no connection to one another were, in fact, a part of a social network through which gun violence spread. *Id.*

238. Kalesan et al., *supra* note 15, at 54.

239. Adeel Hassan, *Dayton Gunman's Friend Bought Body Armor and Ammunition, Authorities Say*, N.Y. TIMES (Aug. 12, 2019), https://www.nytimes.com/2019/08/12/us/connor-betts-ethan-kollie.html.

240. *Tresa Baldas* et al., *Who Is the 24-Year-Old Man Police Say Killed 9 Including His Own Sister in Dayton, Ohio?*, USA TODAY (Aug. 4, 2019) https://www.usatoday.com/story/news/nation/2019/08/04/ohio-shooting-connor-betts-identified-police-dayton-gunman/1916170001/.

241. Louis Klarevas et al., *The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings, 1990–2017*, 109 AM. J. PUB. HEALTH 1754, 1759 (2019). The study also found that large-capacity magazines are used in nearly three times as many mass shootings as smaller capacity magazines. *Id.*

242. *Id.*

243. Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923, 1927–28 (2017).

244. Michael Siegel et al., *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991–2016: A Panel Study*, 34 J. GEN. INTERNAL MED. 2021, 2024 (2019), https://link.springer.com/content/pdf/10.1007%2Fs11606-019-04922-x.pdf.

requirements have also been shown to reduce firearm homicides.[245] Meanwhile, Missouri experienced an increase in firearm suicide rates following the repeal of its handgun permit-to-purchase law larger than any state that retained the same requirement.[246]

And indeed, exposure and access to firearms also have a dramatic impact on self-harm. Firearms are extremely lethal, which likely explains their increased use in suicides. Estimates suggest that suicide attempts using firearms result in death between 80% and 95% of the time.[247] By comparison, poisoning, another method commonly used to attempt suicide, results in death approximately 2% of the time.[248] Meanwhile, episodes of suicidal ideation typically have a quick onset and last only a short amount of time.[249] Prior research found that nearly 75% of suicide attempts occurred within ten minutes of the decision to commit suicide.[250] This helps to explain the research demonstrating an association between gun ownership and death by suicide.[251] Studies have found that gun ownership predicts overall suicide rates independent of other relevant variables, such as prior suicidal behavior, antidepressant use, and psychopathology.[252]

Exposure to firearms can be quite relevant to suicide rates.[253] As a result, the regulation of firearm storage can have a critical impact. Gun owners who stored their firearms at home and in non-secure locations were more likely to die from self-inflicted gunshot wounds.[254] If an individual with suicidal ideation does not have the means to access a firearm with relative ease, there is a significant opportunity for them to move beyond the suicidal ideation episode. If an individual cannot quickly gain access to a firearm during the onset of an episode of suicidal ideation, they are less likely to complete the attempt. This

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245. Cassandra K. Crifasi et al., *Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. URB. HEALTH 383, 383 (2018).

246. Cassandra K. Crifasi et al., *Effects of Changes in Permit-to-Purchase Handgun Laws in Connecticut and Missouri on Suicide Rates*, 79 PREVENTIVE MED. 43, 47 (2015).

247. Michael D. Anestis, et al., *Differentiating Suicide Decedents Who Died Using Firearms from Those Who Died Using Other Methods*, 252 PSYCHIATRY RES. 23, 23 (2017).

248. Erin M. Sullivan et al., *Suicide Trends Among Persons Aged 10-24 Years United States, 1994-2012*, 64 MORBIDITY & MORTALITY WKLY. REP. 201, 204 (2015).

249. Evan M. Kleiman & Matthew K. Nock, *Real-Time Assessment of Suicidal Thoughts and Behaviors*, 22 CURRENT OPINION IN PSYCHOL. 33, 35 (2018).

250. Eberhard A. Deisenhammer et al., *The Duration of the Suicidal Process: How Much Time Is Left for Intervention Between Consideration and Accomplishment of a Suicide Attempt?*, 70 J. CLINICAL PSYCHIATRY 19, 21–22 (2009).

251. Anestis et al., *supra* note 247, at 23.

252. *Id.*

253. Rodrigo F. Alban et al., *Weaker Gun State Laws are Associated With Higher Rates of Suicide Secondary to Firearms*, 221 J. SURGICAL RES. 135, 139 (2018).

254. Anestis et al., *supra* note 247, at 23; *see* Erin Renee Morgan et al., *Firearm Ownership, Storage Practices, and Suicide Risk Factors in Washington State, 2013 2016*, 108 AM. J. PUB. HEALTH 882, 884–85 (2018) ("Our findings add to the body of evidence suggesting that increased suicide risk among members of firearm-owning households is not adequately explained by differential emotional distress or alcohol misuse preceding death by suicide." (footnote omitted)).

delay is crucial when considering approximately 90% of those who did not complete their first suicide attempt will not die by suicide later.[255] Consequently, laws that determine how, when, and who can obtain a firearm, or how an individual must store a firearm in the home, can have a significant impact on suicide rates and, as a result, overall firearm mortality.

Firearm availability can play a critical part in the health disparities discussed earlier. The devastating impact of gun violence on young black males has persisted over long periods and has transcended previously hypothesized causes. The emergence of crack cocaine was typically used to explain the significant rise in the deaths of young black males in the late 1980s and early 1990s.[256] While the drug wars may have been a contributing factor, so too was the increasing availability of guns. Some researchers have stated that the availability of cheap guns is a better measure for the changes in gun violence than tracking crack market activity.[257] One study finds that even sixteen years after the boom in the crack market, murder rates for young black males are 70% higher than they would have been if they had followed historical trends.[258] This study concludes that increased access to firearms is the best explanation for this long-lasting trend, impacting successive cohorts of young black males.[259]

Therefore, legal regimes that allow, or perhaps even enable, the proliferation of firearms can exacerbate existing health disparities. As firearms become more prevalent in certain communities, there is an incentive for others to arm themselves in response.[260] This response creates a contagion-like spread of firearms throughout the community.[261] The law's potential to contribute to the proliferation of firearms, especially in communities of color that already suffer disproportionately from gun violence, further exemplifies the potential for state action to remedy the increasing threat to public health and safety.

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255. David Owens et al., *Fatal and Non-fatal Repetition of Self-Harm*, 181 BRITISH J. PSYCHIATRY 193, 194–96 (2002). There is no evidence that owning a firearm is significantly associated with suicidal ideation. Anestis et al., *supra* note 247, at 23.

256. William N. Evans et al., *Guns and Violence: The Enduring Impact of Crack Cocaine Markets on Young Black Males* (Nat'l Bureau of Econ. Research, Working Paper No. 24819, 2018), https://www.nber.org/papers/w24819.pdf (discussing a study by Bartley and Williams positing that an increase in cheap guns was a larger driver of violence in the mid-1980s).

257. *See id.* at 24 n.21 (discussing a study by Bartley and Williams positing that an increase in cheap guns was a larger driver of violence in the mid-1980s); *see also* Alfred Blumstein & Daniel Cork, *Linking Gun Availability to Youth Gun Violence*, 59 LAW & CONTEMP. PROBS. 1, 8 (1996) (noting that the number of gun homicides doubled between 1985 and 1991, while non-gun homicides remained relatively stable).

258. Evans et al, *supra* note 256, at 32.

259. *Id.* The authors wrote: "We find that even today, nearly 25 years after the peak of the systemic violence in retail crack market, crack-related violence and suicide may explain approximately one tenth of the gap in life expectancy between white and black males." *Id.* at 33.

260. Blumstein & Cork, *supra* note 257, at 11 ("As the availability of guns becomes more widespread, there is an increased incentive for additional youngsters in increasingly larger social networks to arm themselves.").

261. *See id.* ("Thus an escalating process develops, where the possession of guns becomes widespread and continues to extend into juvenile networks well beyond those involved in the drug industry.").

IV. ASSISTANCE WITH UNCERTAINTY

Gun violence is a disease that permeates communities, perpetuating and exacerbating health disparities. But emerging public health data indicate that while gun violence is pervasive, it is preventable. The breadth of morbidity, mortality, and indirect consequences that stem from the proliferation of gun violence outlined in the previous section is not inevitable. Lessons from public health demonstrate that population-level interventions can reduce harms as significant and widespread as gun violence. It is time that we apply public health principles, using empirical data and probability, to bring an end to this growing threat.[262] Analyzing the permissibility of Second Amendment restrictions with public health case law will contribute significantly to finding reasonable solutions.

A. HIGHLIGHTING THE STATE'S INTEREST

Much of the Second Amendment discourse focuses almost exclusively on the right in question, typically attempting to determine the scope of the protections afforded by the Amendment. But to focus the entirety of the analysis on the right is ignoring the other half of the equation. States have always limited fundamental rights in the furtherance of their interests.[263] What is evident is that the state has a clear and compelling interest in regulating Second Amendment rights.

A cursory mention that there is a state interest in public safety does little to underscore the seriousness of the problem. Gun violence has a devastating impact, particularly on the vulnerable, underserved, and communities of color. To limit the understanding of the state's interest in reducing gun violence to a superficial nod to public safety does a disservice to victims of gun violence.

Public health law helps to reframe the legal analysis of any regulation implicating Second Amendment rights by maintaining the centrality of the authority of the state to exercise its police power to protect public health and safety. At its foundation, public health law recognizes the authority of the state to reduce the risk of harm to the public. Yet, risk has two critical components: (1) probability of harm, and (2) magnitude of harm. Therefore, even if the probability of a gun being used to harm, whether purposeful or not, is relatively small, the magnitude of that harm is undeniably great. And even if the probability of any individual experiencing gun violence may be quite low, aggregated across a population of individuals, that probability increases drastically.

This framing is a critical counterpoint to individual challenges of firearm regulations and provides a more thorough legal analysis. An individual would likely argue that while firearms have and may continue to be misused by *others*,

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262. *See* PARMET, *supra* note 112, at 53 ("[P]opulation-based legal analysis demands that lawyers and judges think empirically and probabilistically.").

263. *See supra* Subpart II.C.

that cannot enable the state to infringe on *their* specific constitutional right. In other words, a bad guy with a gun should not limit the rights of the good guy. But confrontations arise, and people may respond suddenly with firearms escalating the resulting violence. Children find guns and use them as toys. Brief moments of suicidal ideation may lead individuals to seek a way to end their lives in a method statistically proven to be most effective. While it may be difficult to predict when and where any of these circumstances may arise, we know they will. The public health law framework demonstrates quite clearly that the state is authorized to regulate proactively under circumstances such as these to prevent precisely these types of harms. And public health data indicates there are regulatory approaches that may be effective in achieving those goals.

This approach does not ignore the importance of constitutional rights or the need for the judiciary to protect them. It does, however, accomplish the goal of balancing between the individual right and the state interest. By examining the devastation caused by firearms more closely, it becomes clear that the state's compelling interest in combatting gun violence likely enables a wide range of firearm regulations. In this sense, even the application of strict scrutiny does not cripple the ability of the state to act under its police power authority.

B. LESSONS FOR SECOND AMENDMENT JURISPRUDENCE

The use of existing public health law precedent to evaluate Second Amendment restrictions will not answer all of the questions left in *Heller* and *McDonald*'s wake. But it is an important piece to the puzzle that has been unjustifiably ignored. If the state interest is public health and safety, case law analyzing state action to protect and further public health and safety is where the precedential search should be occurring. Moreover, this focuses more appropriately on the two essential factors of consideration: the constitutional right and the state authority to minimize the risk of harm. In doing so, defining the specific contours of the Second Amendment right becomes less vital to all Second Amendment analyses.

Where this approach may generate broader ability to restrict Second Amendment rights in some circumstances, it may create more extensive rights in others. For example, one of the unanswered questions of the Second Amendment is who it protects. *Heller* clarifies that the Amendment protects an individual right, but also states that prohibitions for felons and the mentally ill are presumptively lawful with no explanation or citation to help justify this statement. If we are to treat Second Amendment rights with the same respect as other constitutionally protected rights, a permanent and indefinite removal of rights for having committed any felony or for having any mental illness seems especially harsh.

Presumably, the thought behind this statement was public safety. One might assume those who have committed felonies are more likely to commit harm with guns, and those with mental illnesses may have more violent

tendencies or lack the ability to control their actions. Yet, a public health law framework would consider empirical evidence in the constitutional analysis. Rather than rely on stigmatizing stereotypes, an individual may be empowered to demonstrate through data that people with mental illnesses are no more likely to commit violent acts than the average individual.[264] The state should be required to provide more evidence than a footnote to *Heller* to demonstrate that certain individuals that fall into these populations generate a risk of harm. Balancing the rights and risks of a particular person or group of people, supported by empirical evidence, is more likely to be constitutionally prudent in determining if a specific regulation is acceptable.[265]

The public health research on lethality more suitably contextualizes the question of what is protected by the Second Amendment. *Heller* protects handguns in the home as a means of self-defense but does little more. It tells us little about semi-automatic rifles or large-capacity ammunition magazines. Rather than making fruitless attempts to analogize these weapons to historical regulations in the age of muskets, it may be more prudent for a court to look at the harm generated by modern weaponry, such as bullets that explode once they enter the body.

A court may consider the fact that individuals lucky enough to survive a shooting still run the risk of lead poisoning from bullet fragments dispersed throughout their body that are too risky to remove.[266] Or a court may determine that large-scale ammunition magazines increase the risk of overshooting, and conclude that the right of self-defense does not justify certain weapons that create additional risks to innocent bystanders.[267] Potential use for self-defense does not inherently shield these weapons from regulatory restrictions. *Heller* recognized that not all items that can be used for self-defense warrant Second Amendment protection. Any judicial inquiry must consider the type of gun and ammunition alongside the increased risk of harm to the public.

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264. Only 4% of violence generally is attributed to those with mental illness. Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 241–42 (2015). An estimated 3–5% of crimes in the United States are committed by individuals with mental illness, and the estimates are even lower for crimes committed with firearms. *Id.* at 241. Another study looked at 120,000 gun-related killings between 2001 and 2010 and found that less than 5% were committed by people diagnosed with a mental illness. *Id.* Meanwhile, individuals with mental illness are at greater risk of being victims of violence, with people diagnosed with schizophrenia, for example, experiencing victimization rates 65–130% higher than the general public. *Id.* at 242.

265. One example may be red flag laws, or extreme risk protection orders. These laws enable certain individuals to petition a judge to remove firearms from an individual believed to be a threat of harm to themselves or others. They have been passed in response to mass shootings. But, because mental illness is a risk factor for self-harm, there is evidence to suggest these laws are most effective in preventing suicides. *See, e.g.*, Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981 2015*, 69 PSYCHIATRIC SERVS. 855, 857 (2018).

266. Chan, *supra* note 214.

267. Klarevas et al., *supra* note 241, at 1759.

And what of the literature suggesting that lax laws about public carry of firearms increase the risk of homicide?[268] *Heller* recognized the authority to restrict firearms in sensitive spaces but did not mention the public generally. A focus on the right alone might suggest that the need to defend one's self can arise anywhere, including outside of the home, and Second Amendment protections must extend accordingly. But a public health law evaluation would balance the need for self-defense against the risks generated to the public by large numbers of people regularly carrying firearms in public. It may also include an inquiry into what, if anything, data suggests about the success rate of self-defense to determine whether this claim properly overrides the increased risk to the public.

These examples also help to expose the limitations of continuing the historical approaches that were central to *Heller* and *McDonald*. While history may play a role in determining what the Second Amendment protects, such as *Heller*'s declaration of an individual right, it cannot definitively answer what the scope of authority is for a state's police power. As the discussion above notes, gun violence is not merely a problem, but a growing public health crisis.[269] By enabling a state to respond to emerging public health and safety challenges, the police power has an inherent responsiveness that allows, for example, the state to address increasingly lethal weapons or increases in youth suicide.[270] A public health law approach to Second Amendment analysis, when considered alongside the limitations of purely historical analysis, reveals glaring inadequacies. Limiting courts to examining analogous laws from the eighteenth- and nineteenth-century instead of robust empirical data will never provide workable solutions to the problem of gun violence.

CONCLUSION

In 2016, Bullets & Beans encountered more regulatory red tape in Virginia trying to sell coffee than guns.[271] But times are changing, even in the state of the National Rifle Association headquarters. In the November 2019 election, Democrats took control of the Virginia legislature for the first time since 1994.[272] Gun-control advocacy efforts are a primary factor for this historic flip. Groups like Everytown for Gun Safety Action Fund, Everytown for Gun Safety Victory, and the Giffords PAC outspent the National Rifle Association to back candidates who could push forward new regulations.[273]

This political shift is emblematic of a national change in public sentiment about gun rights and a widespread interest in reasonable gun control. Proposals

268. Siegel et al., *supra* note 243, at 1928.

269. *See supra* Part III.

270. *See generally* Ulrich, *supra* note 67, at 190, 197 (discussing the evolutionary nature of the police power that enables the state to respond to emerging public health threats over time).

271. Sidman, *supra* note 1.

272. Jane Coaston, *The NRA's Big Loss in Virginia, Explained*, VOX (Nov. 6, 2019, 4:40 PM), https://www.vox.com/2019/11/6/20951639/nra-virginia-democrats-spending-gun-control.

273. *Id.*

such as background checks on all firearm sales and "assault weapons" bans may soon be the law of Virginia and other states, but constitutional challenges to these infringements on Second Amendment rights are sure to follow. This confluence of competing interests in the lower courts will only compound the confusion following *Heller* and *McDonald*. The public health law framework, with its three-prong focus on identifying empirically-proven threats to public health and safety, evaluating the possibility that government action can mitigate the threat, and striking the appropriate balance between the burdens on individual rights and benefits to the public provides a path forward.

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